OFFICE SUPREME COURT U.S.

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, A. D. 1956

No 475

LLOYD MOREY, Auditor of Public Accounts of the State of Illinois; LATHAM CASTLE, Attorney General of the State of Illinois, and JOHN GUTKNECHT, State's Attorney of Cook County, Illinois,

Defendants-Appellants,

vs.

GEORGE W. DOUD, DONALD Q. McDONALD, [illegible] WESLEY CARLSON, [illegible] BONDIFIED SYSTEMS, [illegible] EUGENE DERRICK,

Plaintiffs-Appellees.

Appeal from United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT

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APPENDIX.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No.

LLOYD MOREY, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND JOHN GUTKNECHT, STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS,
Defendants-Appellants,

vs.

GEORGE W. DOUD, DONALD Q. McDONALD, AND J. WESLEY CARLSON, DOING BUSINESS AS BONDIFIED SYSTEMS, AND EUGENE DERRICK,
Plaintiffs-Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final decree of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 18, 1956, by a three judge court, granting after notice and hearing a permanent injunction enjoining them from enforcing the provisions of the Illinois Currency Exchange Statute (30 to 56.3, Chap. 16½, Ill. Rev. Stat. 1955) against appellees so long as the latter engage only in the business of issuing and selling money orders.

Inasmuch as the original record and printed transcript of the record are on file in this Court in connection with the former appeal in this case by the present appellees (October term, 1955, No. 129), appellants pray that the same may be considered as if filed on this appeal, in addition to the supplemental record filed herewith.

After the entry of the final decree and prior to the filing of notice of appeal, Oryille Hodge resigned as State Auditor of Public Accounts, and appellant Lloyd Morey, his successor, was substituted by order of the District Court.

OPINION BELOW

The opinion of the District Court is not yet reported. Copies of the opinion, findings of fact, conclusions of law, and decree, are attached hereto as Appendix A.

JURISDICTION

This action was brought under 28 U. S. C. sec. 1331, to procure a temporary and permanent injunction enjoining appellants, Illinois' State Auditor and Attorney General and the State's Attorney of Cook County, Illinois from enforcing against appellees, the provisions of the Illinois Currency Exchange Statute, Ill. Rev. Stat. 1955, Chap. 16½, par. 30-56.3; secs. 01-30; Vol. I, pp. 282-290, on the sole ground that the statute allegedly denied appellees equal protection in violation of section 1 of the Fourteenth Amendment to the Federal Constitution because it exempted from its operation the money orders of American Express Company.

No temporary injunction was applied for.

On February 9, 1955, the District Court, after a hearing on the merits, dismissed the amended complaint "for want of jurisdiction". 127 F. Supp. 853.

On March 26, 1956, this Court reversed and remanded with directions to take jurisdiction, but said, "we do not decide what procedures the District Court should follow on remand." 350 U. S. 485.

On June 18, 1956, the decree now appealed from was entered.

Notice of appeal was filed August 6, 1956.

The jurisdiction of the Court to review this decree by direct appeal is conferred by 28 U. S. C. secs. 1253 and 2101 (b). It is believed that *Doud* v. *Hodge*, 350 U. S. 485, sustains the jurisdiction of the Court to review the decree on direct appeal.

STATUTE INVOLVED

This case involves the constitutional validity of the Illinois Currency Exchange Act (approved June 30, 1943, in force October 1, 1943, as amended 1945, 1947, 1949, 1951, and 1953) Ill. Rev. Stat. 1955, Chap. 16½, pars. 30.56.3, secs. 01-30, Vol. J, pp. 282-290. The statutory provisions are lengthy and therefore set forth in Appendix B.

QUESTIONS PRESENTED

1. THE ILLINOIS CURRENCY EXCHANGE ACT, CITED ABOVE, PROVIDES FOR THE LICENSING, REGULATION AND SUPERVISION BY THE STATE AUDITOR OF PUBLIC ACCOUNTS OF COMMUNITY CURRENCY EXCHANGES AS DEFINED THEREIN. SELLERS OF MONEY ORDERS UNDER THEIR OWN PERSONAL OR TRADE NAMES ARE IN GENERAL WITHIN THE STATUTORY DEFINITION OF SUCH CURRENCY EXCHANGES. THE STATUTE SPECIFICALLY EXEMPTS FROM ITS OPERATION STATE AND NATIONAL BANKS AND MONEY ORDERS ISSUED BY THE UNITED STATES POST OFFICE, *AMERICAN EXPRESS COMPANY*, POSTAL TELEGRAPH COMPANY AND WESTERN UNION TELEGRAPH COMPANY.

APPELLEES, A LIMITED PARTNERSHIP AND ITS AGENT, ALL RESIDENTS OF ILLINOIS, HAVE ISSUED AND SEEK TO CONTINUE TO ISSUE AND SELL IN THAT STATE THE PERSONAL MONEY ORDERS OF THE PARTNERSHIP WITHOUT COMPLYING WITH THE STATUTE. DOES THE EXEMPTION OF AMERICAN EXPRESS COMPANY MONEY ORDERS, THERE BEING NO CORRESPONDING EXEMPTION FOR APPELLEES, DENY APPELLEE THE EQUAL PROTECTION OF THE LAWS?

2. SHOULD THE DISTRICT COURT HAVE HELD THAT THE ILLINOIS COURTS HAD NEVER PASSED UPON THE PRECISE LEGAL QUESTIONS PRESENTED HEREIN AND THEREFORE HAVE REMITTED APPELLEES TO THOSE COURTS?

3. IF THE EXEMPTION OF AMERICAN EXPRESS MONEY ORDERS VIOLATES THE EQUAL PROTECTION CLAUSE, SHOULD THE DISTRICT COURT HAVE HELD THE EXEMPTION SEVERABLE?

4. SHOULD THE DISTRICT COURT HAVE HELD THAT APPELLEES' METHOD OF DOING BUSINESS, WHICH HAS INCLUDED AND ADMITTEDLY WILL INCLUDE THE ISSUANCE AND SALE OF THEIR MONEY ORDERS UPON REPRESENTATIONS IMPRINTED ON THE FACE THEREOF THAT THE MONEY TRANSFERS WERE "LICENSED" AND "BONDED" AND THAT THEY "OPERATED UNDER LICENSE GRANTED" THEM, WHEN NEITHER THEY NOR THE TRANSFERS WERE LICENSED OR BONDED UNDER THE STATUTE, AND WHICH INCLUDED THE USE OF A COMMON TRADENAME BY INDEPENDENT MONEY ORDER BUSINESSES IN SEVERAL STATES WHICH HAD NO RESPONSIBILITY TO OR FOR EACH OTHER, CONSTITUTED SUCH VIOLATION OF FEDERAL AND STATE LAW AS TO DEBAR APPELLEES FROM RELIEF?

5. DID APPELLEES MAKE SUCH A SHOWING OF IRREPARABLE INJURY, CLEAR, GREAT AND IMMINENT, AND OF SUCH EXCEPTIONAL CIRCUMSTANCES, AS TO ENTITLE THEM TO INJUNCTIVE RELIEF IN THE FEDERAL COURT?

STATEMENT

The challenged statute generally compels vendors of money orders, including appellees, to comply with its terms but excludes by name, *inter alia*, the American Express Company, as well as the Western Union and Postal Telegraph Companies.

The Supreme Court of Illinois has declared this exemption to be constitutional. *McDougall* v. *Lueder*, Auditor, 389 Ill. 141.

The District Court of three judges in the instant case has declared the exemption to be unconstitutional.

There is thus presented a direct and diametrical conflict of the utterances of the Supreme Court of Illinois and of a triumvirate Federal District Court upon the question of the constitutionality of the statute.

This conflict alone is sufficient to demonstrate the importance of the questions presented.

The challenged statute, passed in 1943, was amended in 48 particulars between 1945 and 1953. It was the first of its kind in this country. Wisconsin, California, New York and New Jersey have since adopted legislation of varying degrees of similarity.

Par. 30 (sec. 01), setting forth the legislative findings, recites *inter alia* that the community currency exchange business has become so widespread since 1933 and so extensively and intimately integrated with the state's financial institutions that it is affected with a public interest; that their number should be limited in accordance with the needs of the communities they are to serve; and that it is in the public interest to assure their financial stability.

Par. 31 (sec. 1) defines a community currency exchange as "any person, firm, association, partnership or corpora-

tion, except banks incorporated under the laws of this state and National Banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services."

Par. 34.1 (sec. 4.1) defines community, and provided that if the issuance of a license would not promote the convenience and advantage of the community, the application therefor shall be denied. The constitutionality of this section was upheld in *Gadlin* v. *Auditor of Public Accounts*, 414 Ill. 89.

Par. 35 (sec. 5) requires performance bonds ranging from $3,000 to $25,000 for the benefit of creditors of the currency exchange.

Par. 36 (sec. 6) requires insurance policies ranging from $2,500 to $35,000 against loss by burglary, larceny, robbery, forgery, or embezzlement.

Par. 37 (sec. 7) requires that each exchange have a minimum of $3,000 cash available at all times, exclusive of funds received for exchange or transfer, and in addition, sufficient liquid funds on hand to pay on demand all its outstanding money orders.

Par. 38 (sec. 8) provides that a currency exchange must be an entity, financed and conducted as a separate business unit.

In 1945 the Illinois Supreme Court upheld the constitutionality of the 1943 statute and the exemption in question, against an attack by community currency exchange operators. *McDougall* v. *Lueder*, 389 Ill. 141. The court said that the business was one in which the public intrusting funds to them for an indefinite length of time, deserved more protection than only the judgment, skill and good luck of the proprietor. As to the exemption, the court said that the legislature had in contemplation purely local problems and that the exempted companies were all highly responsible institutions operating all over the world.

In 1950, a federal District Court in Wisconsin, in passing upon the Wisconsin currency exchange statute, which was patterned after the original Illinois 1943 Act but not after its subsequent amendments, held that the exemption of American Express denied plaintiffs there who were engaged exclusively in the money order business, equal protection. *Currency Services* v. *Matthews*, 90 F. Supp. 40 (W. D., Wis.)

The court below approved the reasoning and conclusions of the Wisconsin court.

There are only 7 exchanges in Wisconsin; there are over 607 in Illinois. Although the historical background for the legislation existed in Illinois, the Wisconsin court decided *Currency Services* v. *Matthews*, from which no appeal was taken, and held that *Weidesweiler* v. *Brundage*, 297 Ill. 228, decided years before the Illinois Currency Exchange Statute was enacted, rather than *McDougall* v. *Lueder*, 389 Ill. 141, was applicable. It said that because American Express and the money order vendors engaged

in the same manner of doing business, i. e., they both sold their money orders principally through agents located in retail stores, they were entitled to the same legislative treatment; but if the money order vendors engaged in the "regular" currency exchange business, they could not complain of the exemption of American Express because they were not then in direct competition with the latter.

American Express was organized in New York in 1868 as an unincorporated joint stock association with a worth then of 18 million dollars. Its assets now exceed a half a billion dollars. It is a worldwide institution of vast ramifications and proportions engaging in such activities as world-wide travel service, foreign remittances, domestic money orders, and travelers checks; and importing and exporting shipments. As depositary of the federal treasury department, it submits to government surveillance and furnishes periodical financial reports. Its wholly owned subsidiary is licensed by the New York State Banking Department. It has a network of 309 offices all over the world, of which 63 are in this country.

It has several offices in Illinois, where it operated long before the statute was passed, and maintains an average of well over 2 million dollars on deposit in 14 Illinois banks.

It started selling its money orders in 1882, and has never defaulted in the payment of its obligations. It has survived every financial depression during its existence.

Appellees originated their limited partnership in Illinois in 1953 and propose to establish on an "earmarked" investment of $10,000, five hundred or more agencies for the sale of their money orders issued under the tradename of "Bondified Systems." Without going into the details shown by the record of appellees' dubious financial operations, it will suffice at this time to say that according to the

uncontradicted evidence their liabilities exceed their assets. They afford the public little protection.

The Illinois currency exchanges for the fiscal year ended in 1952, issued almost half a billion dollars of their money orders. Their assets exceeded 15 million dollars, and they furnished performance bonds covering 91.7% of their average money order liability.

On the original decision by the court below, the majority held that the constitutional question presented could not be decided in the absence of an authoritative determination by the Illinois Supreme Court. 127 F. Supp. 853, 856. In its present decision after the remand, the court, without expressly passing on that point, concluded that the inclusion in the statute of one engaged solely in the money order business coupled with the exemption of a company engaged in that very business rendered the statute discriminatory as to appellees engaged solely in that business but not in the "ordinary" business of a currency exchange.

THE QUESTIONS ARE SUBSTANTIAL.

1. Whether the statute denied appellees equal protection depends upon whether it was an arbitrary and unreasonable distinction for the legislature to make between American Express and them; and the burden was upon appellees to show that such was the fact. The record is void of any showing in that regard except one sole circumstance: they sell their money orders through agents located in retail stores much as does American Express. There the similarity ends.

That there are towering differences between appellees and American Express Company as to solvency, size, financial responsibility, security, business and monetary facilities, age, experience, history, governmental surveillance,

and any other thing having any relation to the protection of the public from loss by reason of the dishonesty, incompetence, ignorance or irresponsibility of persons desiring to issue and sell their money orders under their own names or tradenames, is not denied. The court below disregarded these signal factual distinctions.

That appellees compete with American Express does not prove they are comparably situated. "Mere competition between them is not enough to show two concerns must be burdened alike." *Union Bank & Trust Co. v. Phelps*, 288 U. S. 181, 186.

Nor is it tenable to indulge in speculation as to the future financial responsibility of American Express, as did the Wisconsin court. The legislature "need not take account of new and hypothetical inequalities that may come into existence as time passes or conditions change." *Queenside Hills Co. v. Saxl*, 328 U. S. 80, 84. Should conditions change, the legislature could revoke the exemption or the courts could invalidate it. *Chastleton Corp. v. Sinclair*, 264 U. S. 547, 548.

An otherwise valid statute conferring a privilege is not rendered invalid because particular persons find it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend, *Gant v. Oklahoma City*, 289 U. S. 98, 103, or because of their own failure to enjoy the benefits conferred by the statute as freely as they may, by limiting their business to the performance of only one of the services permitted by the statute. *Aero-Mayflower Transit Co. v. Georgia*, 295 U. S. 285, 289.

A closely analogous case is *Engle v. O'Malley*, 219 U. S. 128. The New York statute there prohibited the business of receiving money for safekeeping or transmission, without

a license, the making of a large deposit and the filing of a large bond with the state comptroller, but exempted express and telegraph companies, and persons in the business who received during the preceding year deposits averaging not less than a fixed amount. This Court held the exemptions did not deny equal protection, and speaking through Mr. Justice Holmes said, pp. 137, 138:

> "It is true, no doubt, that where size is not an index to an admitted evil, the law cannot discriminate between the great and the small. But in this case, size is an index."

Individual exemptions excluding companies by name are not violative of equal protection, where a reasonable basis therefor exists. Squarely in point is: *Williams* v. *Baltimore*, 289 U. S. 36, 42, 46. Other cases are: *Erb* v. *Morasch*, 177 U. S. 584; *Tonota* v. *Hawaii*, 226 U. S. 184; *New York* v. *Zimmerman*, 278 U. S. 63; *Salzburg* v. *State of Maryland* 346 U. S. 545; and Mr. Justice Holmes' opinion in *Interstate Consol. Street Ry. Co.* v. *Mass.* 207 U. S. 78, 85.

Statutory discrimination between situations which are in fact different must be presumed to be relevant to a permissible legislative purpose and will not be deemed to be a denial of equal protection if any state of facts could be reasonably conceived which would support it. The Constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same. The reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field, and regulate it, neglecting the others. *Williamson* v. *Lee Optical of Okla.*, 348 U. S. 483, 488, 489.

The similarity in the manner of selling money orders bears no relevancy to the legislative purpose to protect the public against worthless money orders and should not be permitted to frustrate that purpose. The legislature had the right reasonably to believe that the money orders of American Express were so much safer than those issued by the class of operators of which appellees constitute a part, that their exemption like that of the banks and telegraph companies, was warranted.

The District Court criticized par. 38 (sec. 8) of the statute which requires a currency exchange to be conducted as a separate business unit because it "cannot be reconciled with standards of financial responsibility." The purpose of that section was to prevent the commingling of funds belonging to the currency exchange business and those from other sources, which the legislature had the right to believe was an unsafe financial practice, to the end that the misfortunes or exigencies of other business may not be visited on the money order funds. It was merely incidental to the regulation of the currency exchange business. *Gadlin* v. *Auditor of Public Accounts*, 414 Ill. 89, 94. It was for the legislature to decide what regulations were needed to reduce the evils of that business to the minimum, and it was not required to adopt the most conservative course. *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 83.

As to the possibility of avoidance of process upon American Express, we point out that the company could be sued and served in Illinois as a *de facto* corporation. *Dugan* v. *Int. Assn.*, 202 Ill. App. 308, 309, *Sprainis* v. *Draugstes*, 232 Ill. App. 427, 429, *Fitzpatrick* v. *Rutter*, 160 Ill. 282, 286. Since January 1, 1956, secs. 13.4 and 27.1 of the revised Illinois Civil Practice Act expressly permit suit and service against a partnership in its firm name, and secs. 16 and 17 provide for personal service outside the state on persons

of other states transacting business within Illinois. Ill. Rev. Stat. 1955, Chap. 110, pars. 13.4, 16, 17, 27.1.

As to the federal courts, Federal Rules 4 (d) (3) and 4 (d) (7) apply. *Wilson & Co.* v. *W. V. W.*, 83 F. Supp. 162, 166, 167 (S. D., N. Y.); *Bushy* v. *Electric Union*, 147 F. (2) 865, 867 (App., D. C.); *Operatives, etc. Ass'n.* v. *Case*, 93 F. (2) 56, 65-68 (App., D. C.).

2. The court below emphasized that appellees are not engaged in the "ordinary" business of a currency exchange, a characterization that conflicts with the plain language of the statute. The Wisconsin court made the same distinction, holding that the *Weidesueiler* case, 297 Ill. 228, rather than the *McDougall* case, 389 Ill. 141, applied. The first decision of the court below said that the majority could not decide the constitutional issue without an authoritative determination by the Illinois Supreme Court as to whether the distinction between appellees' business and that of the plaintiffs in the *McDougall* case was valid a distinction "plaintiffs themselves have made and emphasized." 127 F. Supp. 853, 856. The court below in its last opinion said that the Illinois Supreme Court did not appear to have had occasion to consider the full extent of the Act's discriminatory effect. The decision of this Court did not pass upon the point. 350 U. S. 485. The need of such a determination by the State Supreme Court, which is now magnified by the District Court's interpretation, would seem to be still present in the case, *Federation of Labor* v. *McAdory*, 325 U. S. 450, 471; *C. I. O.* v. *McAdory*, 325 U. S. 472, 477, *Railroad Comm.* v. *Pullman Co.*, 312 U. S. 496, 499, 450, and the parties should have been remitted to the state courts. *Stainback* v. *Mo Hock*, 336 U. S. 368, 383.

3. The Illinois Supreme Court has never decided whether the severability clause in par. 26.3 (sec. 30) of the

statute in question would be so applied as to remove the alleged discrimination. The *McDougall* case, 389 Ill. 141, 151, did not pass upon it because it upheld the exemption. Severability is a question that might be more appropriately left for adjudication to the Illinois Supreme Court. *Liggett v. Lee*, 288 U. S. 517, 541.

4. Appellees came into equity with unclean hands because of false representations imprinted on their money orders that they "operated under a license granted" them; and that their "money transfer" was "licensed" and "bonded". The natural effect of such language in Illinois was to mislead and deceive the public and they cannot be heard to deny their intention of so doing. *Preservalene Mfg. Co. v. Heller Chemical Co.*, 118 F. 103, 105, 106 (N. D., Ill.). Also the indiscriminate use of the name "Bondified" by owners of independent money order businesses not responsible for each other's liabilities and acts, the name being impressed upon the public through a course of unified advertising, is a continuing misrepresentation of the ownership of the business and the financial responsibility thereof. *Morton Salt Co. v. Suppiger*, 314 U. S. 488, 494, *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 224; *Worden & Co. v. Cal. Fig Syrup Co.*, 187 U. S. 516, 528.

The doctrine of unclean hands assumes wider and more significant proportions where a suit concerns the public interest, for then it averts injury to the public. *Precision Co. v. Automotive Co.*, 324 U. S. 806, 814, 815.

Also, the question of unclean hands is a matter that might appropriately be left to state court determination. *Ford v. Caspers*, 128 F. (2) 884, 885 (C. A. 7); *De Sylva v. Ballentine*, 351 U. S. 570, 580; *Chicago v. Fielderest Dairies*, 316 U. S. 168, 172, 173.

5. There was no evidence of irreparable injury, clear, great and imminent, and of such exceptional circumstances as would entitle appellees to injunctive relief in the federal courts. The only showing made in that regard was that several months before appellees commenced the sale of their money orders, an employee in the State Auditor's office told them that the office would stand back of the law. That has been held clearly insufficient. *Watson* v. *Buck*, 313 U. S. 387, 400, *Douglass* v. *Jeanette*, 319 U. S. 157, 162, 163; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45, 50. The penalties in the statute are not so severe as to intimidate against a contest of its validity. *Rast* v. *Van Deman*, 240 U. S. 342, 368. Any moneys paid the Auditor under the statute could later have been recovered if paid under protest and the statute were held unconstitutional. Ill. Rev. Stat. 1955, Chap. 127, pars. 172, 172a.

The questions presented are substantial and of great public importance.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE W. DOUD, DONALD Q. McDONALD, and J. WESLEY CARLSON, doing business as BONDIFIED SYSTEMS, and EUGENE DERRICK,
Plaintiffs,
v.
ORVILLE HODGE, Auditor of Public Accounts of the State of Illinois, LATHAM CASTLE, Attorney General of the State of Illinois, and JOHN GUTKNECHT, State's Attorney of Cook County, Illinois,
Defendants.

Civil Action No. 53 C 2322

June 12, 1956

Before ELMER J. SCHNACKENBERG, Judge of the United States Court of Appeals for the Seventh Circuit, WALTER J. LA BUY and JULIUS J. HOFFMAN, District Judges.

HOFFMAN, District Judge. The plaintiffs, George W. Doud, Donald Q. McDonald and J. Wesley Carlson, a partnership doing business as Bondified Systems, and Eugene Derrick, agent of said partnership, seek to enjoin the defendants from enforcing the provisions of the Illinois Community Currency Exchange Act (Ill. Rev. Stat. 1955, c. 16½, §§30-56.3) against them on the ground that it violates the Fourteenth Amendment to the federal constitution in that it discriminates unlawfully against them and in favor of the American Express Company. The defendants are the Auditor of Public Accounts of the State of Illinois, the Attorney General of the State of Illinois, and the State's Attorney of Cook County, Illinois.

After all of the evidence was heard, this court, pursuant to a memorandum of February 4, 1955, dismissed the complaint for want of jurisdiction. Brief findings of fact and conclusions of law were entered on February 9, 1955. Our order dismissing the complaint was reversed by the Supreme Court, 350 U. S. 485 (March 26, 1956), which remanded the case to us. Having considered the evidence and the briefs previously filed by the parties, we are ready to determine whether or not the plaintiffs are entitled to the relief they seek.

The Illinois Currency Exchange Act establishes a system of regulation of currency exchanges throughout the state and requires, among other things, a license, the payment of fees, bonds, insurance, annual reports, etc. The provisions of the Act apply to all community currency exchanges as that term is defined in §31 of the Act. It is in the definition of a currency exchange, however, that the alleged discriminatory provision appears. Section 31 provides:

> "'Community currency exchange' means any person, firm, association, partnership or corporation, . . . engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, *or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than* United States Post Office money orders, *American Express Company money orders*, Postal Telegraphy Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services." (Emphasis added.)

The plaintiffs, who sell "Bondified" Post Card Checks and Money Orders under a license from Checks, Inc.* a Minnesota corporation which owns the registered trade mark,

* The license agreement with Checks, Inc., was entered into by the corporation organized by the three plaintiffs, Bondified Systems, Inc. In accordance with its terms, however, the license was assigned to the partnership formed by the same three persons.

contend, and the evidence sustains, that they operate their business in substantially the same manner as that of the American Express Company—i.e., they confine their operations to selling and issuing money orders, and this business is conducted through authorized agents,** located principally in retail establishments such as drug and grocery stores. Yet the plaintiffs are unable to operate lawfully under the Act since §38 prohibits a currency exchange from being conducted as a part of another business; and even if they could overcome this obstacle, they would be required to obtain a separate license for each agency and to pay the numerous license and inspection fees for each outlet. American Express, on the other hand, is relieved of all these burdens.

The defendants have raised several preliminary matters in addition to the point previously dealt with by this court and the Supreme Court. Defendants claim that the plaintiffs may not invoke the equitable powers of this court because they have not come into equity with clean hands. For this they rely on two matters: (1) On the partnership money order forms the word "Licensed" appears at the bottom of the form in small letters opposite the word "Bonded." This is said to amount to a fraud on the public by implying that plaintiffs are licensed under the Illinois Currency Exchange Act; (2) The operation by the partnership under a license from Checks, Inc., is said itself to constitute a fraud because no license of a trade mark may be made unless accompanied by a transfer of the business.

The defense of unclean hands could be summarily disposed of by reference to a similar charge made in *Toomer v. Witsell*, 334 U. S. 385 (1948). The Supreme Court noted that some of the plaintiffs had previously been convicted of violations of the statutes whose validity they attacked.

> "The District Court held that this previous misconduct, not having any relation to the constitutionality of the challenged statutes, did not call for application of the clean hands maxim. We agree." 334 U. S. at 393.

**Plaintiffs, in recognition of the fact that they cannot operate legally under the Illinois Act, have established to date only one agency in this state althought they have 120 in operation in Northern Indiana.

and see opinion of the District Court, 73 F. Supp. 371, 374 (E. D. S. Car. 1947)

Since the defendants vigorously urge this point, we will go beyond the short answer. While the use of the word "Licensed" might appear ambiguous to us, no evidence was introduced to show that the public is enticed into purchasing Bondified Money Orders by reason of their belief that the plaintiffs hold a license under the Currency Exchange Act. Moreover, we were persuaded by the plaintiffs' sincerity in explaining that they intended the expression to refer to a license from Checks, Inc., to handle Bondified Money Orders. This conduct is clearly not of such a nature as to bar the plaintiffs from relief.

With respect to the license of the trade mark "Bondified" from Checks, Inc., defendants contend that the attempt to license the use of a trade mark without a concurrent transfer of the business itself was ineffective and a fraud. Even if it is assumed that the same principles apply to service marks as to ordinary trade marks, a license may be made of a mark other than as an incident of a transfer of business so long as the agreement is not merely a "naked" license agreement. *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America*, 167 F. 2d 848 (Ct. Customs & Patent App. 1948; decided without benefit of the liberalizing provisions of the Lanham Act). In that case the court approved an agreement under which the licensor established certain standards for the licensee to follow in making the product under the assigned trade mark. A trade mark license is valid if it provides for "supervisory control of the product or services". *Arthur Murray, Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953). The "Operator Contract" (Pl. Ex. 5) between Checks, Inc., and Bondified Systems, Inc., through which the plaintiffs are authorized to deal in Bondified checks and money orders, contains numerous controls and standards which Bondified Systems and its agencies must meet and is much more than a "naked" license agreement.

The plaintiffs have, we believe, sufficiently demonstrated the imminence of irreparable injury, entitling them to injunctive relief. See *Toomer* v. *Witsell*, 334 U. S. 385, 391-92 (1948). While the defendants allege that their threats to enforce the Act were general and call attention to the fact

that they have taken no legal action against the plaintiffs,* they concede that plaintiffs will be required to qualify under the Act and that they will enforce it against plaintiffs when the latter violate it, which admittedly they are doing now. The defendant officials were not apprised of a violation until shortly before plaintiffs filed their complaint. To operate as a currency exchange without first securing a license subjects the plaintiffs to a criminal prosecution and the penalty of a heavy fine, or imprisonment, or both. In the meantime the plaintiffs, presumably to avoid further possible penalties, are withholding establishment of additional agencies and losing the opportunity to conduct and expand their business.

We turn now to the constitutional validity of the Currency Exchange Act as applied to these plaintiffs. In *Currency Services, Inc.* v. *Matthews*, 90 F. Supp. 40 (W. D. Wis. 1950), a federal three court enjoined enforcement of the Wisconsin currency exchange statute, which was virtually identical to the Illinois statute, on the ground that it violated the equal protection clause of the Fourteenth Amendment. The plaintiff in the *Matthews* case, like these plaintiffs, engaged only in the business of issuing money orders. The Wisconsin court held:

> "It is the inclusion, in the definition of the term 'community currency exchange', of one who, though not engaged in the check-cashing business ordinarily designated by that term is 'engaged in the business of selling or issuing money orders', coupled with the exemption of a company engaged in that very business, which, it seems to us, renders the statute discriminatory and unconstitutional as applied to the plaintiff corporation or to any other person or firm engaged in the business of selling or issuing money orders but not in the ordinary business of a currency exchange." 90 F. Supp. at p. 45.

We approve the reasoning and conclusions of the Wisconsin court and see no reason to depart from them in this case.

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* The State's Attorney of Cook County contends that he should not be made a party to this proceeding because the plaintiffs' only agency operating at the moment is not located in Cook County, the territorial limit of his authority. The injunctive relief requested, however, is intended to prevent interference with operation of plaintiffs' business in the future. Moreover, the plaintiffs themselves are located in Cook County, and any attempts to enforce the Act would have to be directed primarily against them in that jurisdiction.

The fact that the constitutionality of the Illinois Act was previously sustained by the Illinois Supreme Court in *McDougall* v. *Lueder*, 389 Ill. 141 (1945), is not conclusive. A close examination of the *McDougall* opinion discloses that the court based its conclusion that the classification was reasonable on the ground that the legislature was concerned only with regulating local community exchanges, as opposed to world-wide operations. This point was answered in the *Matthews* case:

> "While it is true that American Express operates on a world-wide scale, this does not alter the fact that its Wisconsin operations are not at all different from those contemplated by plaintiff corporation and would be subject to the provisions of the statute if carried on by any one other than American Express or its agents." 90 F. Supp. at p. 44.

While we accord great respect to the views of the Illinois Supreme Court, it does not appear that that court had occasion to consider the full extent of the Act's discriminatory effect. Moreover, it is difficult to accept the attempt to explain the exemption of American Express on the basis that regulation of that company is not required in order to protect local interests. The evidence here, while not entirely clear, tends to show that American Express has no license to transact business in this state, is not subject to any form of state regulation, does not always require bonds of its agents, as plaintiffs do, and may even be able successfully to avoid service of process by the courts of this state.

It is further suggested that the real purpose of the Act was to eliminate irresponsible fly-by-night companies, and the exemption merely reflected the high integrity and financial responsibility of American Express which is unique in its field. No one denies these facts. Nor do we suggest that the legislature could not establish reasonable standards of financial responsibility which all would be required to meet to qualify for an exemption. But the difficulty with this Act is that it denies everyone but American Express the opportunity to demonstrate financial responsibility or the adoption of adequate safeguards to protect the public. The plaintiffs, who have adopted a number of precautionary measures to insure protection of their customers, have no opportunity to prove their trustworthiness. Moreover,

at least one of the provisions of the Act cannot be reconciled with standards of financial responsibility. Under § 38 the plaintiff Derrick, who has an established Bondified agency, is prohibited from selling Bondified money orders in connection with his drug store business, but he was permitted to sell American Express money orders at the same store in 1948 and 1949. This restriction exists quite apart from the requirements of licensing and fees. While the plaintiffs have only begun their business,* other Bondified licensees have operated for ten years or more and have conducted a substantial and, so far as this record shows, a responsible business. We are unable to find a reasonable basis on which to sustain the classification expressed in the Illinois Currency Exchange Act.

In view of the Illinois Supreme Court's statement in the *McDougall* case that "The General Assembly would surely never have passed the act if they had thought the said companies [i. e., American Express, Postal Telegraph and Western Union] would be made subject to its rules and regulations" (389 Ill. at p. 151), an injunction will issue restraining the defendants from enforcing the provisions of the Community Currency Exchange Act against the plaintiffs, so long as they engage only in the business of issuing and selling money orders.

Counsel for the plaintiffs will prepare and submit to the court on or before June 15, 1956, findings of fact, conclusions of law and a judgment order in keeping with the views herein expressed.

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* Nevertheless, in their first year of operation the plaintiffs sold over $1,400,000 of money orders in Northern Indiana alone.

Caption omitted

Before ELMER J. SCHNACKENBERG, Judge of the United States Court of Appeals for the Seventh Circuit, WALTER J. LA BUY and JULIUS J. HOFFMAN, District Judges.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter having come on to be heard before the court of three judges convened pursuant to 28 U.S.C. §§2281 and 2284 upon the amended complaint filed by plaintiffs and the answers filed by the defendants, and the court having heard evidence presented in open court, having considered the evidence and arguments of counsel and being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

The Court finds:

1. The plaintiffs George W. Doud, Donald Q. McDonald and J. Wesley Carlson, a partnership doing business as Bondified Systems, and Eugene Derrick, agent of said partnership, seek to enjoin the defendants Orville Hodge, Auditor of Public Accounts of the State of Illinois, Latham Castle, Attorney General of the State of Illinois, and John Gutknecht, State's Attorney of Cook County, Illinois, from enforcing against the plaintiffs the provisions of the Illinois Community Currency Exchanges Act, Sections 30-56.3 of Chapter 16½ of the Illinois Revised Statutes 1955, on the ground that it violates the Fourteenth Amendment to the Federal Constitution in that it discriminates unlawfully against them and in favor of the American Express Company.

2. The amount in controversy herein exceeds the sum of $3,000.00 exclusive of interest and costs.

3. The partnership of plaintiffs Doud, McDonald and Carlson is organized to engage, and has been engaging not in the ordinary business of a currency exchange, but exclusively in the business of selling and issuing money or-

ders through agents who are principally persons engaged in operating retail stores.

4. The plaintiffs sell "Bondified" postcard checks and money orders under a license from Checks, Inc., a Minnesota corporation which owns the registered trademark, and they operate their business in substantially the same manner as that of the American Express Company, in that they confine their operations to selling and issuing money orders, and this business is conducted through authorized agents located principally in retail establishments, such as drug and grocery stores. American Express Company, which is exempt from the operation of the Act, is engaging in the same activity.

5. The plaintiffs Doud, McDonald and Carlson, in recognition of the fact that they cannot operate legally under the Illinois Act, have established to date only one agency in this state although they have 120 in operation in northern Indiana where in their first year of operation they sold over $1,400,000 of money orders.

6. On the partnership money order forms the word "Licensed" appears at the bottom of the form in small letters opposite the word "Bonded". Said plaintiffs intended the expression "Licensed" to refer to a license from Checks, Inc. to handle Bondified money orders, and no evidence was introduced to show that the public was enticed into purchasing the plaintiffs' Bondified money orders by reason of the belief that the plaintiffs were licensed under the Illinois Community Currency Exchange Act.

7. The "operator contract" through which the plaintiffs are authorized to deal in Bondified checks and money orders, contains numerous controls and standards which Bondified Systems and its agents must meet and is much more than a naked license agreement. The plaintiffs have adopted a number of precautionary measures to insure protection of their customers.

8. American Express Company is an aggregation of individuals operating under a joint stock company plan. It is not a corporation. It sells and issues money orders in the City of Chicago, Illinois, through operators of drug and grocery stores. The evidence tends to show that American Express Company has no license to transact business in this state, is not subject to any form of state regulation,

does not always require bonds of its agents as plaintiffs do, and may even be able successfully to avoid service of process by the courts of this state.

9. The plaintiff Derrick, who has an established Bondified agency, is prohibited by §38 of the Act from selling Bondified money orders in connection with his drug store business, but he was permitted to sell American Express Company money orders at the same store in 1948 and 1949.

10. The defendants concede that plaintiffs will be required to qualify under the Act and that they will enforce it against the plaintiffs when the latter violate it, which admittedly they are doing now. The defendant officials were not apprised of a violation until shortly before plaintiffs filed their complaint. To operate as a currency exchange without first securing a license subjects the plaintiffs to a criminal prosecution and the penalty of a heavy fine or imprisonment, or both. In the meantime, the plaintiffs, presumably to avoid further possible penalties, are withholding establishment of additional agencies and losing the opportunity to conduct and expand their business. The plaintiffs have demonstrated the imminence of irreparable injury.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and of the subject matter of this proceeding.

2. The Illinois Community Currency Exchange Act establishes a system of regulation of currency exchanges throughout the state and requires, among other things, a license, the payment of fees, bonds, insurance, annual reports, etc. The provisions of the Act apply to all community currency exchanges as that term is defined in §31 of the Act which defines "Community Currency Exchange" as "any person, firm, association, partnership or corporation * * * engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders, or any other evidence of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, Amer-

ican Express Company money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders", or engaged in both such businesses, or engaged in performing any one or more of the foregoing services".

3. Plaintiffs are unable to operate lawfully under the Act since 38 thereof prohibits a currency exchange from being conducted as a part of another business; and even though they could overcome this obstacle they would be required to obtain a separate license for each agency and to pay the numerous license and inspection fees for each outlet. American Express Company, on the other hand, is relieved of all these burdens.

4. The use by the plaintiffs of the word "Licensed" is clearly not of such a nature as to bar the plaintiffs from relief.

5. The trademark license under which the plaintiffs operate provides for supervisory control of the product or services and is valid.

6. It is the inclusion, in the definition of the term "Community Currency Exchange" of one who, though not engaged in the check cashing business ordinarily designated by that term is "engaged in the business of selling or issuing money orders", coupled with the exemption of a company engaged in that very business, renders the statute discriminatory and unconstitutional as applied to the plaintiffs who are engaged in the business of selling or issuing money orders but not in the ordinary business of a currency exchange. The exemption of the American Express Company from the provisions of the Illinois Community Currency Exchange Act does not constitute a reasonable classification, and that Act as applied to the plaintiffs violates the equal protection clause of the Fourteenth Amendment.

7. The plaintiffs are entitled to the issuance of an injunction restraining the defendants from enforcing the provisions of the Illinois Community Currency Exchange Act against the plaintiffs so long as they engage only in the business of issuing and selling money orders.

s/ Elmer J. Schnackenberg
s/ Julius J. Hoffman
s/ Walter J. La Buy

Dated: June 18, 1956

Caption omitted.

Before ELMER J. SCHNACKENBERG, Judge of the United States Court of Appeals for the Seventh Circuit, WALTER J. LA BUY and JULIUS J. HOFFMAN, District Judges.

DECREE.

This matter having come on to be heard before the court of three judges convened pursuant to 28 U. S. C. §§ 2281 and 2284, upon the amended complaint filed by plaintiffs and the answers filed by the defendants, and the Court having heard evidence presented at the trial and having considered the same, having heard arguments and received briefs of counsel, and having examined the opinion of the Supreme Court with respect to the jurisdiction of the court and being fully advised.

IT IS ORDERED, ADJUDGED AND DECREED that the defendants be, and they are hereby, enjoined from enforcing the provisions of the Illinois Community Currency Exchanges Act (§ 30 to 56.3, Chap. 16½, Illinois Revised Statutes 1955) against the plaintiffs so long as they engage only in the business of issuing and selling money orders; and

IT IS FURTHER ORDERED that the plaintiffs recover from the defendants their costs herein, including the costs adjudged by the Supreme Court, for which let execution issue.

ENTER:

ELMER J. SCHNACKENBERG,
JULIUS J. HOFFMAN,
WALTER J. LA BUY.

Dated June 18, 1956.

APPENDIX B

Currency Exchange Law:

"AN ACT *in relation to the definition, licensing and regulation of community currency exchanges and ambulatory currency exchanges, and the operators and employees thereof, and to make an appropriation therefor, and to provide penalties and remedies for the violation thereof.*" (Approved June 30, 1943, in force October 1, 1943, as amended.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 01. The General Assembly has found and declares: that the community currency exchange business, as hereinafter defined in Section 1, has become so widespread since the bank holiday in 1933, and so extensively and intimately integrated with the financial institutions of this State that it is affected with a public interest and should be licensed and regulated as a business affecting the convenience, general welfare, and economic interest of the people of this State;

that no community currency exchange should be operated without a license, or otherwise than in accordance with the regulations provided in, or to be provided pursuant to this Act;

that the number of community currency exchanges should be limited in accordance with the needs of the communities they are to serve, and in accordance with the provisions of this Act;

that there has arisen also the ambulatory currency exchange business, as hereinafter defined in Section 1, which has engaged heretofore in unlicensed competition with the licensed community currency exchange business;

that it is in the public interest to promote and foster the community currency exchange business and to assure the financial stability thereof;

that the operations of the ambulatory currency exchange business have enabled it to appropriate the most profitable

function of the community currency exchange business without incurring the expenses of, or subjecting itself to the regulations imposed upon the community currency exchange business and to secure thereby an unfair advantage; that there has resulted therefrom an unfair and ruinous competition to the licensed community currency exchange business;

that the nature of the ambulatory currency exchange business is such as to render it hazardous and dangerous to the public safety and security;

that the public welfare demands that no ambulatory currency exchange business should be operated without a license, or otherwise than in accordance with the regulations provided in, or to be provided pursuant to this Act.

Section 1. For the purposes of this Act: "Community currency exchange" means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services.

"Ambulatory Currency Exchange" means any person, firm, association, partnership or corporation, except banks organized under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged in one or both of the foregoing businesses, or engaged in performing any one or more of the foregoing services, at any location other than that of a fixed and permanent place of business of his, their or its own.

"Auditor" means the Auditor of Public Accounts.

Nothing in this Act shall be held to apply to any person, firm, association, partnership, or corporation who is en-

gaged primarily in the business of transporting for hire, bullion, currency, securities, negotiable or non-negotiable documents, jewels or other property of great monetary value and who in the course of such business and only as an incident thereto, cashes checks, drafts, money orders or other evidences of money directly for, or for the employees of and with the funds of and at a cost only to, the person, firm, association, partnership or corporation for whom he or it is then actually transporting such bullion, currency, securities, negotiable or non-negotiable documents, jewels, or other property of great monetary value, pursuant to a written contract for such transportation and all incidents thereof; nor shall it apply to any person, firm, association, partnership or corporation engaged in the business of selling tangible personal property at retail who, in the course of such business and only as an incident thereto, cashes checks, drafts, money orders or other evidences of money.

Sec. 2. No person, firm, association, partnership or corporation shall engage in the business of a community currency exchange or in the business of an ambulatory currency exchange without first securing a license to do so from the Auditor.

Any person, firm, association, partnership or corporation issued a license to do so by the Auditor shall have authority to operate a community currency exchange or an ambulatory currency exchange, as defined in Section 1 hereof.

No license shall be issued for the conduct of an ambulatory currency exchange on any public street or highway. An ambulatory currency exchange shall be required to and shall secure a license or licenses for the conduct of its business at each and every location served by it, as provided in Section 4 hereof. No license issued for the conduct of its business at one location shall authorize the conduct of its business at any other location.

Any person, firm, association, partnership or corporation that violates this section shall be fined not less than $500.00 nor more than $1000.00 or imprisoned in the county jail for not more than one year, or both, and the Attorney General or the State's Attorney of the county in which the violation occurs shall file a complaint in the Circuit Court of the county to restrain the violation.

Sec. 3. No community or ambulatory currency exchange shall be permitted to accept money or evidences of money as a deposit to be returned to the depositor or upon the depositor's order; and no community or ambulatory currency exchange shall be permitted to act as bailee or agent for persons, firms, partnerships, associations or corporations to hold money or evidences thereof or the proceeds therefrom for the use and benefit of the owners thereof, and deliver such money or proceeds of evidence of money upon request and direction of such owner or owners: provided, that nothing contained herein shall prevent a community or an ambulatory currency exchange from obtaining state automobile and city vehicle licenses for a fee or service charge, or from rendering a photostat service, or from rendering a notary service either by the proprietor of the currency exchange or any one of its employees, authorized by the State of Illinois to act as a notary public, or from selling travelers cheques obtained by the currency exchange from a banking institution under a trust receipt, or from issuing money orders or from accepting for payment local utility bills; provided, further, that in accepting any such payment the community or ambulatory currency exchange shall not be deemed to act as agent for the local utility, nor shall such community or ambulatory currency exchange be authorized to receipt for such payment in the name, or on behalf, of such utility.

Sec. 3.1. Nothing in this Act shall prevent a currency exchange from rendering State or Federal income tax service; nor shall the rendering of such service be considered a violation of this Act if such service be rendered either by the proprietor or any of his employees.

Sec. 4. Application for such license shall be in writing, under oath and in the form prescribed and furnished by the Auditor. Each application shall contain the following:

(a) The full name and address (both of residence and place of business) of the applicant, and if the applicant is a partnership or association, of every member thereof, and the name and business address if the applicant is a corporation;

(b) The county and municipality, with street and number, if any, where the community currency exchange is to be conducted, if the application is for a community currency exchange license;

(c) If the application is for an ambulatory currency exchange license, the names and addresses of the plants or businesses at the location or locations to be served by it: and

(d) The applicant's occupation or profession: a detailed statement of his business experience for the ten years immediately preceding his application; a detailed statement of his finances; his present or previous connection with any other currency exchange; whether he has ever been involved in any civil or criminal litigation, and the material facts pertaining thereto; whether he has ever been committed to any penal institution or admitted to an institution for the care and treatment of mentally ill persons; and the nature of applicant's occupancy of the premises to be licensed where the application is for a community currency exchange license. If the applicant is a partnership, the information specified herein shall be required of each partner. If the applicant is a corporation, the said information shall be required of each officer and director thereof.

Such application shall be accompanied by a fee of $25.00 which fee shall be for the cost of investigating the applicant. When the application for a community currency exchange license has been approved by the Auditor and the applicant so advised, an additional sum of $50.00 as an annual license fee for a period terminating on the last day of the current calendar year shall be paid to the Auditor by the applicant; provided; that the license fee for an applicant applying for such a license after July 1st of any year shall be $25.00 for the balance of such year.

When the application for an ambulatory currency exchange license has been approved by the Auditor, and such applicant so advised, such applicant shall pay an annual license fee of $10.00 for each and every location to be served by such applicant; provided that such license fee for an approved applicant applying for such a license after July 1st of any year shall be $5.00 for the balance of such year for each and every location to be served by such applicant. An approved applicant shall not be required to pay the initial investigation fee of $25.00 more than once. Such an approved applicant, when applying for a license with respect to a particular location, shall file with the Auditor, at the time of filing an application, a letter or memorandum,

which shall be in writing and under oath, signed by the owner or authorized representative of the place of business where service is to be rendered; such letter or memorandum shall contain a statement that such service is desired, and that the person signing the same is authorized so to do.

Sec. 4.1. Upon receipt of an application for a license for a community currency exchange, the Auditor shall investigate the need of the community for the establishment of a community currency exchange at the location specified in the application.

"Community", as used in this Act, means a locality where there may or can be available to the people thereof the services of a community currency exchange reasonably accessible to them. If the issuance of a license to engage in the community currency exchange business at the location specified, will not promote the convenience and advantage of the community in which the business of the applicant is proposed to be conducted, then the application shall be denied.

Sec. 4.2. Whensoever the ownership of any currency exchange, theretofore licensed under the provisions of this Act, shall be held or contained in any estate subject to the control and supervision of any Administrator, Executor, Guardian or Conservator appointed, approved or qualified by any Court of the State of Illinois having jurisdiction so to do, such Administrator, Executor, Guardian or Conservator, may, upon the entry of an order by such Court granting leave to continue the operation of such currency exchange, apply to the Auditor of Public Accounts for a license under the provisions of this Act. When any such Administrator, Executor, Guardian, or Conservator shall apply for a currency exchange license pursuant to the provisions of this Section, and shall otherwise fully comply with all of the provisions of this Act relating to the application for a currency exchange license, the Auditor may issue to such applicant a currency exchange license. Any currency exchange license theretofore issued to a currency exchange, for which an application for a license shall be sought under the provisions of this Section, if not previously surrendered, lapsed, or revoked, shall be surrendered, revoked or otherwise terminated before a license shall be issued pursuant to application made therefor under this Section.

Sec. 5. Before any license shall be issued to a community currency exchange the applicant shall file annually with and have approved by the Auditor a surety bond, issued by a bonding company or insurance company authorized to do business in this State in the principal sum of $3,000.00. Such bond shall run to the Auditor and shall be for the benefit of any creditors of such currency exchange for any liability incurred by the currency exchange on any money orders issued or sold by the currency exchange and for any liability incurred by the currency exchange for any sum or sums due to any payee or endorsee of any check, draft or money order left with the currency exchange for collection, and for any liability incurred by the currency exchange in connection with the rendering of any of the services referred to in Section 3 of this Act.

If after the expiration of one year from the issuance of the license the Auditor shall determine that the average amount of such liability during said year has exceeded the sum of $4,000.00 and has been less than $5,000.00, the Auditor shall require the licensee to furnish a bond for the ensuing year to be approved by the Auditor in the principal sum of $4,000.00. If such average amount is in excess of $5,000.00 the bond shall be for an additional principal sum of $1,000.00 for each $1,000.00 or fraction thereof in excess of the original $5,000.00; however, the maximum amount of such bond shall not exceed the principal sum of $25,000.00.

Sec. 6. Every applicant for a license hereunder shall, after his application for a license has been approved, file with and have approved by the Auditor, a policy or policies of insurance issued by an insurance company or indemnity company authorized to do business under the laws of this State, which shall insure the applicant against loss by burglary, larceny, robbery, forgery or embezzlement in a principal sum as hereinafter provided; if the average amount of cash and liquid funds to be kept on hand in the office of the community currency exchange during the year will not be in excess of $2,500 the policy or policies shall be in the principal sum of $2,500. If such average amount will be in excess of $2,500, the policy or policies shall be for an additional principal sum of $500 for each $1,000 or fraction thereof of such excess over the original $2,500, provided that the maximum amount of such insurance shall in no event exceed the principal sum of $35,000.00. From time

to time the Auditor may determine the amount of cash and liquid funds on hand in the office of any community currency exchange and shall require the licensee to submit additional policies if the same are determined to be necessary in accordance with the requirements of this section.

Any such policy or policies, with respect to forgery, may carry a condition that the community currency exchange assumes the first $50 of each claim thereunder.

Sec. 7. Each community currency exchange shall have, at all times, a minimum sum of $3,000 of its own cash funds available for the uses and purposes of its business and said minimum sum shall be exclusive of and in addition to funds received for exchange or transfer; and in addition thereto each such licensee shall at all times have on hand an amount of liquid funds sufficient to pay on demand all outstanding money orders issued by it.

In the event a receiver is appointed in accordance with Section 15.1 of this Act, and the Auditor determines that the business of the currency exchange should be liquidated, and if it shall appear that the said minimum sum was not on hand or available at the time of the appointment of the receiver, then the receiver shall have the right to recover in any court of competent jurisdiction from the owner or owners of such currency exchange, or from the stockholders and directors thereof if such currency exchange was operated by a corporation, said sum or that part thereof which was not on hand or available at the time of the appointment of such receiver. Nothing contained in this section shall limit or impair the liability of any bonding or insurance company on any bond or insurance policy relating to such community currency exchange issued pursuant to the requirements of this Act, nor shall anything contained herein limit or impair such other rights or remedies as the receiver may otherwise have at law or in equity.

Sec. 8. A community or an ambulatory currency exchange shall not be conducted as a department of another business. It must be an entity, financed and conducted as a separate business unit. This shall not prevent a community or an ambulatory currency exchange from leasing a part of the premises of another business for the conduct of this business on the same premises; provided, that no community currency exchange shall be conducted on the same

premises with a business whose chief source of revenue is derived from the sale of alcoholic liquor for consumption on the premises; provided, further, that no community currency exchange hereafter licensed for the first time shall share any room with any other business, trade or profession nor shall it occupy any room from which there is direct access to a room occupied by any other business, trade or profession.

Sec. 9. No community or ambulatory currency exchange shall issue tokens to be used in lieu of money for the purchase of goods or services from any enterprise.

Sec. 10. The applicant, and its officers and directors, if a corporation, shall be vouched for by two reputable citizens of this State setting forth that the individual mentioned is (a) personally known to them to be trustworthy and reputable, (b) that he has business experience qualifying him to competently conduct, operate, own or become associated with a currency exchange, (c) that he has a good business reputation and is worthy of a license. Thereafter, the Auditor shall, upon approval of the application filed with him, issue to the applicant qualifying under this Act, a license to operate a currency exchange. If it is a license for a community currency exchange, the same shall be valid only at the place of business specified in the application. If it is a license for an ambulatory currency exchange, it shall entitle the applicant to operate only at the location or locations specified in the application, provided the applicant shall secure separate and additional licenses for each of such locations. Such licenses shall remain in full force and effect, until they are surrendered by the licensee, or revoked, or expire, as herein provided. If the Auditor shall not so approve, he shall not issue such license or licenses and shall notify the applicant of such denial, retaining the $25.00 investigation fee to cover the cost of investigating the applicant. The Auditor shall approve or deny every application hereunder within ninety days from the filing thereof; except that in respect to an application by an approved ambulatory currency exchange for a license with regard to a particular location to be served by it, the same shall be approved or denied within twenty days from the filing thereof.

No application shall be denied unless the applicant has had notice of a hearing on said application and an oppor-

tunity to be heard thereon. If the application is denied, the Auditor shall, within twenty days thereafter prepare and keep on file in his office a written order of denial thereof, which shall contain his findings with respect thereto and the reasons supporting the denial, and shall send by United States mail, a copy thereof to the applicant at the address set forth in the application, within five days after the filing of such order. A review of any such decision may be had as provided in Section 22.01 of this Act.

Sec. 10.1. For the purposes of this Act, the Auditor, and the hearing officer, as hereinafter provided, shall have power to require by subpoena the attendance and testimony of witnesses, and the production of all documentary evidence relating to any matter under hearing pursuant to this Act, and shall issue such subpoenas at the request of any interested party. The hearing officer may sign subpoenas in the name of the Auditor.

The Auditor may, in his discretion, direct that any hearing pursuant to this Act, shall be held before a competent and qualified agent of the Auditor, whom the Auditor shall designate as the hearing officer in such matter. The Auditor, and the hearing officer, are hereby empowered to, and shall, administer oaths and affirmations to all witnesses appearing before them. The hearing officer, upon the conclusion of the hearing before him shall certify the evidence to the Auditor.

Any Circuit Court of this State, within the jurisdiction of which such hearing is carried on, may, in case of contumacy, or refusal of a witness to obey a subpoena, issue an order requiring such witness to appear before the Auditor, or the hearing officer, or to produce documentary evidence, or to give testimony touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Sec. 11. Such license, if issued for a community currency exchange, shall state the name of the licensee and the address at which the business is to be conducted. Such license shall be kept conspicuously posted in the place of business of the licensee and shall not be transferable or assignable. If issued for an ambulatory currency exchange, it shall so state, and shall state the name and office address of the licensee, and the name and address of the location or loca-

tions to be served by the licensee, and shall not be transferable and assignable.

Sec. 12. If the Auditor shall find at any time that the bond is insecure or exhausted or otherwise doubtful, an additional bond in like amount to be approved by the Auditor shall be filed by the licensee within thirty (30) days after written demand therefor upon the licensee by the Auditor.

Sec. 13. No more than one place of business shall be maintained under the same license, but the Auditor may issue more than one license to the same licensee upon compliance with the provisions of this Act governing an original issuance of a license, for each new license.

Whenever a licensee shall wish to change the name or place of business as originally set forth in his license, he shall give written notice thereof to the Auditor and if the change is approved by the Auditor he shall attach to the license, in writing, a rider stating the new name or the new address or location of the community currency exchange.

Every application for a change of location of a community currency exchange shall be treated by the Auditor with respect to the approval or disapproval of the proposed location, in the same manner as is otherwise provided in this Act for the treatment of proposed locations as contained in original applications for community currency exchange licenses; and if any fact or condition then exists with respect to the application for change of location, which fact or condition would otherwise authorize denial of an original application for a community currency exchange license because of the proposed location, then such application for change of location shall not be approved.

Sec. 13.1. Whenever two or more licensees shall desire to consolidate their places of business, they shall make application for such consolidation to the Auditor upon a form provided by him. This application shall state: (a) the name to be adopted and the location at which the business shall be located, which name and location shall be the same as one of the consolidating licensees; (b) that the owners, or all partners, or all stockholders, as the case may be, of the licensees involved in the contemplated consolidation, have approved the application; (c) a certification by the secretary, if any of the licensees be corporations, that the con-

templated consolidation has been approved by all of the stockholders at a properly convened stockholders meeting; (d) other relevant information the Auditor may require. Simultaneously with the approval of the application by the Auditor, the licensee or licensees who will cease doing business shall: (a) surrender their license or licenses to the Auditor; (b) transfer all of their assets and liabilities to the licensee continuing to operate by virtue of the application; (c) apply to the Secretary of State, if they be corporations, for surrender of their corporate charter in accordance with the provisions of "The Business Corporation Act", filed July 13, 1933, as amended.

An application for consolidation shall be approved or rejected by the Auditor within 30 days after receipt by him of such application and supporting documents required thereunder.

Such consolidation shall not affect suits pending in which the surrendering licensees are parties; nor shall such consolidation affect causes of action nor the rights of persons in particular; nor shall suits brought against such licensees in their former names be abated for that cause.

Nothing contained herein shall limit or prohibit any action or remedy available to a licensee or to the Auditor under Sections 15, 15.1 or 15.2 of this Act.

Sec. 14. Every licensee shall, on or before November 15, pay to the Auditor the annual license fee or fees for the next succeeding calendar year and shall at the same time file with the Auditor the annual report required by Section 16 of this Act, and the annual bond or bonds, and the insurance policy or policies as and if required by this Act. The annual license fee for each community currency exchange shall be $50.00. The annual license fee for each location served by an ambulatory currency exchange shall be $10.00.

Sec. 15. The Auditor may, upon ten (10) days notice to the licensee by United States mail directed to the licensee at the address set forth in the license, stating the contemplated action and in general the grounds therefor, and upon reasonable opportunity to be heard prior to such action, revoke any license issued hereunder if he shall find that:

(a) The licensee has failed to pay the annual license fee or to maintain in effect the required bond or bonds or insurance policy or policies or to comply with any order,

decision, or finding of the Auditor made pursuant to this Act; or that

(b) The licensee has violated any provision of this Act or any regulation or direction made by the Auditor under this Act; or that

(c) Any fact or condition exists which, if it had existed at the time of the original application for such license, would have warranted the Auditor in refusing the issuance of the license; or that

(d) The licensee has not operated the currency exchange licensed, for a period of sixty consecutive days, unless the licensee was prevented from operating during such period by reason of events or acts beyond the licensee's control.

The Auditor may revoke only the particular license or licenses for particular places of business or locations with respect to which grounds for revocation may occur or exist, or if he shall find that such grounds for revocation are of general application to all places of business or locations, or to more than one place of business or location operated by such licensee, he may revoke all of the licenses issued to such licensee or such number of licenses to which such grounds apply, as the case may be.

A licensee may surrender any license by delivering to the Auditor written notice that he, they or it thereby surrenders such license, but such surrender shall not affect such licensee's civil or criminal liability for acts committed prior to such surrender, or affect the liability on his, their or its bond or bonds, or his, their or its policy or policies of insurance, required by this Act, or entitle such licensee to a return of any part of the annual license fee or fees.

Every license issued hereunder shall remain in force until the same shall expire, or shall have been surrendered or revoked in accordance with this Act, but the Auditor may on his own motion, issue new licenses to a licensee whose license or licenses shall have been revoked if no fact or condition then exists which clearly would have warranted the Auditor in refusing originally the issuance of such license under this Act.

No license shall be revoked until the licensee has had notice of a hearing thereon and an opportunity to be heard.

When any license is so revoked, the Auditor shall within twenty (20) days thereafter, prepare and keep on file in his office, a written order or decision of revocation which shall contain his findings with respect thereto and the reasons supporting the revocation and shall send by United States mail a copy thereof to the licensee at the address set forth in the license within five (5) days after the filing in his office of such order, finding or decision. A review of any such order, finding or decision may be had as provided in Section 22.01 of this Act.

Sec. 15.1. If the Auditor determines that any licensee is insolvent or is violating this Act, he shall appoint a receiver, who shall, under his direction, for the purpose of the receivership, take possession of and title to the books, records and assets of every description of said community currency exchange. The Auditor shall require of the receiver such security as he deems proper and, upon appointment of the receiver, shall have published, once each week for four consecutive weeks in a newspaper having a general circulation in the community, a notice calling on all persons who have claims against the community currency exchange, to present them to the receiver.

Within ten days after the receiver takes possession of the property, the licensee may apply to the Circuit Court of Sangamon County to enjoin further proceedings in the premises.

The receiver may operate the community currency exchange until the Auditor determines that possession should be restored to the licensee or that the business should be liquidated. If the Auditor determines that the business should be liquidated he shall direct the Attorney General to file a bill in the Circuit Court of the county in which such community currency exchange is located, in the name of the People of the State of Illinois, for the orderly liquidation and dissolution of the community currency exchange and for an injunction restraining the licensee or the officers and directors thereof from continuing the operation of said community currency exchange.

The receiver shall, thirty days from the day the Auditor determines that the business should be liquidated, file with the Auditor and with the clerk of such court as may have charge of the liquidation, a correct list of all creditors who

have not presented their claims. The list shall show the amount of the claim after allowing all just credits, deductions and set-offs as shown by the books of the currency exchange. These claims shall be deemed proven unless objections are filed by some interested party within the time fixed by the Auditor or court that has charge of the liquidation.

The Auditor may make a ratable dividend of the moneys collected by the receiver on all claims that have been proved to his satisfaction or adjudicated in a court of competent jurisdiction whenever moneys are available for distribution.

All unclaimed dividends shall be deposited with the Auditor to be paid out by him when proper claims therefor are presented to the Auditor, and the Auditor shall pay the same out of such sums or funds so deposited with him. After one year from the final dissolution of the currency exchange, the Auditor shall make a pro-rata distribution thereof to those claimants who have accepted dividends until such claim or claims are paid in full, and if any of said monies shall then remain in his hands, the Auditor shall distribute same pro-rata to the owner, owners or stockholders of the currency exchange. The Auditor shall deduct, from the funds so deposited with him the expenses of distributing same.

Upon the order of a court of competent jurisdiction of the county wherein the community currency exchange is located, the receiver may sell or compound any bad or doubtful debt, and on like order may sell the personal property of the community currency exchange on such terms as the court approves. The receiver shall succeed to whatever rights or remedies the unsecured creditors of the currency exchange may have against the owner or owners, operators, stockholders, directors, or officers thereof, arising out of their claims against the currency exchange; provided, however, that nothing herein contained shall prevent such creditors from filing their claims in the liquidation proceeding. The receiver may enforce such rights or remedies in any court of competent jurisdiction.

At the close of the receivership, it shall be the duty of the receiver to turn over to the Auditor all books of account and ledgers of such currency exchange for preservation. All records of such receiverships heretofore and hereafter

received by the said Auditor shall be held by him for a period of two years after the close of the receivership and at the termination of said two year period may then be destroyed.

All expenses of the receivership, including reasonable receiver's, solicitor's and attorney's fees, approved by the Auditor, shall be paid out of the assets of the community currency exchange; and all expenses of any preliminary or other examinations into the condition of the community currency exchange or receivership, and all expenses incident to the possession and control of any property or records of the community currency exchange incurred by the Auditor shall be paid out of the assets of the community currency exchange. The foregoing expenses shall be paid prior to and ahead of all claims.

Upon the filing of a complaint by the Attorney General for the orderly liquidation and dissolution of a community currency exchange, as herein provided, all pending suits and actions upon unsecured claims against such currency exchange shall abate; provided, however, that nothing contained herein shall prevent such claimants from filing their claims in the liquidation proceeding. In the event a suit or an action is instituted or maintained by the receiver on any bond or policy of insurance issued pursuant to the requirements of this Act, the bonding or insurance company sued, shall not have the right to interpose or maintain any counterclaim based upon subrogation, or upon any express or implied agreement of, or right to, indemnity or exoneration, or upon any other express or implied agreement with, or right against, the currency exchange. Nothing herein contained shall prevent such bonding or insurance company from filing such claim in the liquidation proceeding.

Sec. 15.2: No community currency exchange shall determine its affairs and close up its business unless it shall first deposit with the Auditor an amount of money equal to the whole of its debts, liabilities and lawful demands against it, including the costs and expenses of this proceeding, and shall surrender to the Auditor its community currency exchange license, and shall file with the Auditor a statement of termination signed by the licensee of such community currency exchange, containing a pronouncement of intent to close up its business and liquidate its liabilities, and also

containing a sworn list itemizing in full all such debts, liabilities and lawful demands against it. Corporate licensees shall attach to, and make a part of such statement of termination, a copy of a resolution providing for the determination and closing up of the licensee's affairs, certified by the secretary of such licensee and duly adopted at a shareholders' meeting by the holders of at least two thirds of the outstanding shares entitled to vote at such meeting. Upon the filing with the Auditor of a statement of termination the Auditor shall cause notice thereof to be published once each week for three consecutive weeks in a public newspaper of general circulation published in the city or village where such community currency exchange is located, and if no newspaper shall be there published, then in a public newspaper of general circulation nearest to said city or village; and such publication shall give notice that the debts, liabilities and lawful demands against such community currency exchange will be redeemed by the Auditor on demand in writing made by the owner thereof, at any time within three years from the date of first publication. After the expiration of such three year period, the Auditor shall return to the person or persons designated in the statement of termination to receive such repayment and in the proportion therein specified, any balance of money then remaining in his possession, if any there be, after first deducting therefrom all unpaid costs and expenses incurred in connection with this proceeding. The Auditor shall receive for his services, exclusive of costs and expenses, two per cent of any amount up to $5,000.00, and one per cent of any amount in excess of $5,000.00, deposited with him hereunder by any one community currency exchange. Nothing contained herein shall affect or impair the liability of any bonding or insurance company on any bond or insurance policy issued under this Act relating to such community currency exchange.

Sec. 16. Each licensee shall annually, on or before the fifteenth day of November, file a report with the Auditor for the fiscal year period from October 1st through September 30th (which shall be used only for the official purposes of the Auditor) giving such relevant information as the Auditor may reasonably require concerning, and for the purpose of examining, the business and operations during the preceding fiscal year period of each licensed currency

exchange conducted by such licensee within the State. Such report shall be made under oath and shall be in the form prescribed by the Auditor and the Auditor may at any time and shall at least once in each year investigate the currency exchange business of any licensee and of every person, partnership, association and corporation who or which shall be engaged in the business of operating a currency exchange. For that purpose, the Auditor shall have free access to the offices and places of business and to such records of all such persons, firms, partnerships, associations and corporations and to the officers and directors thereof that shall relate to such currency exchange business. The Auditor may at any time, and shall at least, once a year, inspect the locations served by an ambulatory currency exchange, for the purpose of determining whether such currency exchange is complying with the provisions of this Act at each location served. The Auditor may require by subpoena the attendance of and examine under oath all persons whose testimony he may require relative to such business, and in such cases the Auditor, or any qualified representative of the Auditor whom the Auditor may designate, may administer oaths to all such persons called as witnesses, and the Auditor, or any such qualified representative of the Auditor, may conduct such examinations, and there shall be paid to the Auditor for each such examination a fee of $20.00 for each day or part thereof for each qualified representative designated and required to conduct the examination; provided, however, that in the case of an ambulatory currency exchange, such fee shall not be increased by reason of the number of locations served by it.

Sec. 17. Every licensee shall keep and use in his business such books, accounts and records as will enable the Auditor to determine whether such licensee is complying with the provisions of this Act and with the rules, regulation and directions made by the Auditor hereunder.

Sec. 18. The applicant for a community currency exchange license shall have a permanent address as evidenced by a lease of at least six months duration or other suitable evidence of permanency, and the license issued, pursuant to the application shall be valid only at that address or any new address approved by the Auditor.

Sec. 19. The Auditor may make and enforce such reasonable, relevant regulations, directions, orders, decisions

and findings as may be necessary for the execution and enforcement of this Act and the purposes sought to be attained herein. All such regulations, directions, orders, decisions and findings shall be filed and entered by the Auditor in an indexed permanent book or record, with the effective date thereof suitably indicated, and such book or record shall be a public document. All regulations and directions, which are of a general character, shall be printed and copies thereof mailed to all licensees within ten (10) days after filing as aforesaid. Copies of all findings, orders and decisions shall be mailed to the parties affected thereby by United States mail within five (5) days of such filing.

Sec. 19.1. Whenever an ambulatory currency exchange shall be actively engaged at any place or station on a location licensed under this Act in the cashing of checks other than from within an armored vehicle, such currency exchange shall provide at least one armed guard at each such place or station in addition to the person or persons cashing checks.

Sec. 19.2. Before any license or renewal of license shall be issued for any location served by an ambulatory currency exchange, the applicant thereof shall file with and have approved by the Auditor a surety bond for each such location, issued by a bonding or insurance company, licensed to do business in this State, in the penal sum of $2,000.00. The bond shall be conditioned that the licensee serving the location shall comply with Section 19.1 of this Act and shall pay all lawful claims for money or other property loss, or bodily injury, suffered in the course and by reason of a holdup at such location, that shall occur at the time or times when said licensee failed to comply with said Section 19.1. Such bond shall run to the Auditor and shall inure to the benefit of any person or persons who shall establish a lawful claim or claims as aforesaid. The applicant shall have the right, at his, their, or its option, to file in lieu of the bond or bonds required by this section, a blanket surety bond, which he, they, or it shall have approved by the Auditor, issued by a bonding or insurance company, licensed to do business in this State, covering all the locations served and to be served by such applicant, in a penal sum of not to exceed $100,000.00, conditioned and

payable as aforesaid, and specifying that the liability thereunder for each location shall be limited to $2,000.00.

Sec. 20. Every person having taken an oath in any proceeding or matter wherein an oath is required by this Act, who shall swear wilfully, corruptly or falsely in a matter material to the issue or point in question, or shall suborn any other person to swear as aforesaid, shall be guilty of perjury or subornation of perjury, as the case may be.

Sec. 21. Except as otherwise provided for in this Act, whenever the Auditor is required to give notice to any applicant or licensee, such requirement shall be complied with if, within the time fixed herein, such notice shall be enclosed in an envelope plainly addressed to such applicant or licensee, as the case may be, at the address set forth in the application or license, as the case may be, United States postage fully prepaid, and deposited, registered, in the United States mail.

Sec. 22. Repealed by Act approved June 9, 1949, effective January 1, 1950.

Sec. 22.01. All final administrative decisions of the Auditor hereunder shall be subject to judicial review pursuant to the provisions of the "Administrative Review Act," approved May 8, 1945, and all amendments and modifications thereof, and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 1 of the "Administrative Review Act."

Sec. 22.02. Appeals from all final orders and judgments entered by a court in review of any final administrative decision of the Auditor hereunder may be taken directly to the Supreme Court by either party to the action in accordance with the provisions of the "Civil Practice Act" relating to appeals, and all existing and future amendments and modifications thereof and the rules adopted pursuant thereto.

Sec. 23. If any licensee, or agent or employee of a licensee, fraudulently takes and secretes any money, note, bill, bond or other property belonging to another and in the possession and custody of such licensee as agent or otherwise, he shall be guilty of larceny and punished accordingly.

Sec. 24. Any person, firm, association, partnership or corporation who or which shall violate any provision of this

Act for which no other penalty is herein prescribed shall, upon conviction, be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), and each violation shall constitute a separate offense.

Sec. 25. Any community currency exchange in existence upon the date of the passage of this Act shall be approved by the Auditor as to location, if all other requirements set forth in this Act shall have been complied with.

Sec. 26. The sum of one hundred thousand dollars ($100,000.00), or so much thereof as may be necessary, is appropriated to the Auditor of Public Accounts for the purpose of administering the provisions of this Act.

Sec. 27. Nothing contained in this Act shall be construed so as to limit the power of municipalities, to license and tax community currency exchanges, and to regulate their location and operation in a manner not inconsistent with this Act.

Sec. 28. Unless an ambulatory currency exchange shall engage in the business of selling or issuing money orders under his, their or its name, or any money orders other than those excepted in Section 1 of this Act, Sections 5, 6 and 7 of this Act shall not be applicable to it. Otherwise, said sections shall apply to it, if it shall engage in such business.

Sec. 29. The operation of any unlicensed community or ambulatory currency exchange, or the unlawful conduct or operation of any licensed community or ambulatory currency exchange, is hereby declared to constitute unfair competition with licensed and legally operated currency exchanges doing business in the same community. Any licensee operating legally under this Act in the same community shall have the right to apply to any court of competent jurisdiction for and obtain an injunction restraining such unfair competition.

Sec. 30. If any part or provision of this Act shall be declared unconstitutional, the unconstitutionality of such part or provision shall not invalidate the constitutional provisions of this Act.

Supreme Court of the United States

No 475

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 475

LLOYD MOREY, Auditor of Public Accounts of the State of Illinois; LATHAM CASTLE, Attorney General of the State of Illinois; and BENJAMIN S. ADAMOWSKI, State's Attorney of Cook County, Illinois,

Defendants-Appellants

v.

GEORGE W. DOUD, DONALD Q. McDONALD, and J. WESLEY CARLSON, doing business as Bondafied Systems, and EUGENE DERRICK,

Plaintiffs-Appellees

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR APPELLANTS

Appellants appeal from the final decree of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 18, 1956, by a three-judge court, granting after notice and hearing a permanent injunction enjoining them from enforcing the provisions of the Illinois Corrupt Practices Statute (30 to 30d, Chapter

Ill. Rev. Stat. 1955) against appellees so long as the latter engage only in the business of issuing and selling money orders. (Rec. 530, 528.)

After the entry of the final decree and prior to the filing of notice of appeal, Orville Hodge resigned as State Auditor of Public Accounts, and appellant Lloyd Morey, his successor, was substituted by order of the District Court. (Rec. 530.)

Likewise, after the appeal was perfected, the term of office of John Gutknecht as State's Attorney of Cook County, Illinois, expired, and Benjamin S. Adamowski was elected his successor. By order of this Court pursuant to stipulation, the latter has been substituted.

Also, it was ordered by this Court pursuant to stipulation that this cause may be heard upon the transcript of record printed and now on file in *Doyle et al. v. Hodge, et al.*, No. 129, October Term, 1955, together with the printed record of the proceedings in the District Court following this Court's order of remandment entered in No. 129, October Term 1955. (350 U. S. 485.) (Rec. 533.)

Opinions Below

The opinion of the District Court in connection with the decree from which this appeal was taken is not yet reported. Copies of the opinion, findings of fact, conclusions of law, and decree, are attached hereto as Appendix A. (Rec. 517-528.)

The prior opinion of that Court rendered prior to this Court's order of remandment, is reported in 127 F. Supp. 853. Copies of that opinion, dissenting opinion, findings of fact, conclusions of law, and decree, which this Court reversed and remanded (350 U. S. 485), are attached hereto as Appendix B.

Jurisdiction

This action was brought under 28 U.S.C. sec. 2281 to procure a temporary and permanent injunction enjoining appellants, Illinois' State Auditor of Public Accounts, Attorney General, and State's Attorney of Cook County, Illinois, from enforcing against appellees, the provisions of the Illinois Currency Exchange Statute, Ill. Rev. Stat. 1955, Chap. 16½, pars. 30-56.3, secs. 1-29, Vol. I, pp. 252-[illegible], on the sole ground that the statute allegedly denied appellees equal protection in violation of sec. 1 of the 14th Amendment to the Federal Constitution because it excepted from its operation the money orders of American Express Company. (Rec. 16).

No temporary injunction was applied for.

On February 9, 1955, the District Court, after a hearing on the merits, dismissed the amended complaint for want of jurisdiction. (Rec. 510; 127 F. Supp. 853; Appendix B).

On March 26, 1956, this Court reversed and remanded with directions to take jurisdiction, but said, "we do not decide what procedures the District Court should follow on remand." 350 U. S. 485.

On June 18, 1956, the decree now appealed from was entered. (Rec. 528; Appendix A).

Notice of appeal was filed August 6, 1956. (Rec. 530).

The jurisdiction of this Court to review the decree by direct appeal is conferred by 28 U.S.C. secs. 1253 and 2101 (b).

Probable jurisdiction was noted December [illegible], 1956. (Rec. 534).

Statute Involved

This case involves the constitutional validity of the Illinois Currency Exchange Statute (approved June 30, 1943, in force October 1, 1943, as amended 1945, 1947, 1949, 1951, and 1953), Ill. Rev. Stat. 1955, Chap. 16½, pars. 30.56.3, secs. 01.30, Vol. 1, pp. 282-290. The statutory provisions are lengthy and therefore set forth in Appendix C.

Questions Presented

1. The Illinois Currency Exchange Statute, cited above, provides for the licensing, regulation and supervision by the State Auditor of Public Accounts of community currency exchanges as defined therein. Sellers of money orders under their own personal or trade names are in general within the statutory definition of such currency exchanges. The statute specifically exempts from its operation state and national banks, and money orders issued by the United States Post Office, *American Express Company*, Postal Telegraph Company and Western Union Telegraph Company.

Appellees, a limited partnership and its agent, all residents of Illinois, have issued and seek to continue to issue and sell in that state the personal money orders of the partnership under its tradename without complying with the statute. Does the exemption of American Express Company money orders, there being no corresponding exemption for appellees, deny appellees the equal protection of the laws?

2. Should the District Court have held that the Illinois courts have never passed upon the precise legal questions presented herein and therefore have remitted appellees to those courts?

3. If the exemption of American Express money orders violates the equal protection clause, should the District Court have held the exemption severable?

4. Should the District Court have held that appellees' method of doing business, which has included and admittedly will include the issuance and sale of their money orders upon representations imprinted on the face thereof that the money transfers were "licensed" and "bonded" and that they "operated under license granted" them, when neither they nor the transfers were licensed or bonded under the statute, and which included the use of a common tradename by independent money order businesses in several states which had no responsibility to or for each other, constituted such violation of federal and state law as to debar appellees from relief?

5. Did appellees make such a showing of irreparable injury, clear, great and imminent, and of such exceptional circumstances, as to entitle them to injunctive relief in the federal court?

Statement

During the early 1930's, concurrently with the closing of many banks in the Chicago area, the public need for simple bank facilities gave birth to a new business known as the currency exchange, which sold its personal checks under the name of money orders, or cashier checks, or engaged in both such activities, and often performed such incidental services as accepting for payment local utility bills, obtaining automobile licenses, and rendering notarial and photostat services.

The bank holiday in 1933, and the reduced number of banks thereafter, created such a demand for the services of currency exchanges that they multiplied rapidly. In

nois. *Gadlin v. Auditor of Public Accounts*, 414 Ill. 89, 97. New problems ensued due to the fact that many went into the business on an inadequate investment without sufficient safeguards for the protection of the public. The resulting insolvency and defalcations of some of the operators with accompanying losses to the public led in 1943 to the passage of the Illinois Community Currency Exchange Act. Between 1943 and 1955, it was amended in 48 particulars. (Rec. 305-309) (Appendix C)

The Illinois Act was the first of its kind in the country, and it was said that it "will in all probability become the model for similar statutes in other jurisdictions, for the reason that the statute attempts to combat evils which exist in many parts of the country." 156 ALR 1068.

Wisconsin in 1945 copied the 1943 statute, but never adopted the amendments. (1955 Wisc. Stats. sec. 218.05, p. 2917). Later, California, (Deerings' Cal. Codes, Annot. Financial Div. sec. 12000 et seq.); New York (N. Y. Consol. Law Serv., Vol. 1 Banking Law, secs. 366-374); and New Jersey (Title 17, N. J. S. A. sec. 17: 15 A 1; L. 1951 C 187, p. 696), adopted legislation of varying degrees of similarity.

The Illinois 1943 statute contained a broad comprehensive plan for the regulation of currency exchanges from their inception to their dissolution or liquidation, to the end that the public dealing with and entrusting funds to them, might be protected against the dishonesty, bad judgment, or misfortune of the currency exchange operators, which it may reasonably be assumed, furnished ample background for the passage of the legislation.

In 1944, the act was attacked in the state courts by certain community currency exchange operators for alleged repugnance to the state and federal constitutions, and particularly the 14th Amendment. It was claimed, *inter alia*,

that the exemption of American Express, Postal Telegraph, and Western Union money orders violated equal protection.

The Illinois Supreme Court in 1945 upheld the constitutionality. *McDougall v. Lawder*, 389 Ill. 141. The court said that the business was one in which the public, entrusting funds to the currency exchanges for an indefinite length of time, deserved more protection than only the skill, judgment and good luck of the proprietor; that the opportunities for loss through embezzlement, larceny, the unauthorized use or the mishandling of funds, were obvious; and that as to the exemption, the legislature had "in contemplation purely local problems", and that the exempted companies were "all highly responsible institutions operating all over the world and in no sense to be considered as local companies engaged in community affairs." (p. 151.)

In 1948, the Illinois Supreme Court held that the 1943 statute could not be construed to include mobile units cashing payroll checks on the employers' premises pursuant to private contract. However, the court expressly adhered to the McDougall decision and again pointed out the local nature of the currency exchange business. *People v. Thillens*, 400 Ill. 224, 230, 236.

In 1950, a three judge federal district court in Wisconsin passing upon the Wisconsin statute held that the exemption of American Express denied plaintiffs there, who were engaged exclusively in the money order business, equal protection so long as they engaged only in that business and not in the additional activity of cashing checks. It said that because American Express and plaintiffs there sold their money orders through agents located in retail stores, they were entitled to the same legislative treatment, since they were in direct competition with each other. If plaintiffs were to engage in the "regular" currency exchange busi-

ness, then they could not complain, it said, because then they would not be in direct competition. It rejected the McDougall decision in favor of an Illinois decision rendered years before the Illinois statute was passed, *i.e.*, *Wedeking v. Brundage*, 297 Ill. 228, and thus despite the fact that the McDougall decision distinguished *Wedeking v. Brundage* because of the difference in the statutes involved. 389 Ill. 141, 150.

The Wisconsin court said that the financial condition of American Express was no guaranty that it would continue, and that the McDougall decision misplaced its emphasis on the local nature of the currency exchange business. *Currency Services v. Matthews*, 90 F. Supp. 40 (W. D. Wisc.)

Thus the Wisconsin decision, decided in a state which has only 7 currency exchanges (Rec. 110), and from which no appeal was taken, made a differentiation nowhere found in the statute and expressly repudiated the controlling Illinois decision.

The decree now here appealed from is predicated entirely upon the Wisconsin decision. It likewise rejected the McDougall decision because, as the court said, "it does not appear" that the Illinois Supreme Court "had occasion to consider the full extent of the Act's discriminatory effect," and "it is difficult to accept the attempt to explain the exemption * * * on the basis that regulation of that company is not required in order to protect local interests." (Appendix A)

In 1951, the Illinois legislature amended the statute in a number of significant particulars. It added its findings and declarations which *inter alia* pointed up the local nature of the business (par. 30, sec. 01); it defined "community", and prohibited the issuance of a license unless it would promote the convenience and advantage of the community in which the proposed business was to be conducted (par. 34.1,

(sec. 4.1); and it expressly incorporated the regulation of ambulatory currency exchanges, or mobile units, so as to overcome the effect of *People v. Thillens*, 400 Ill. 224, referred to *supra*.

In 1953, the Illinois Supreme Court upheld the constitutionality of par. 34.1 (sec. 4.1), holding that the "unrestricted issuance of licenses in a community to the point of saturation would tend to decrease the net earnings of each exchange to the point of insolvency of one or more of the exchanges with the inevitable result of losses to the public." *Gadlin v. Auditor of Public Accounts*, 414 Ill. 89, 95. Thus the court again emphasized the local nature of the business.

In *Thillens, Inc. v. Hodge*, 2 Ill. (2) 45, decided in 1954, the court distinguished *People v. Thillens*, 400 Ill. 224, *supra*, and refused to affirm a lower court judgment which invalidated the 1951 amendment relating to the ambulatory currency exchanges, thus showing the comprehensive sweep of the legislation intended for all units in the currency exchange business. The lower court, on retrial, has again voided the ambulatory amendment on the ground that it was not a proper exercise of the police power, and the appeal therefrom is now pending in the Illinois Supreme Court. (No. 34315)

Par. 30 (sec. 01) of the statute in controversy recites *inter alia* that the business has become so widespread since the bank holiday in 1933 and so extensively and intimately integrated with the state's financial institutions that it is affected with a public interest; that their number should be limited in accordance with the needs of the communities they are to serve; and that it is in the public interest to promote and foster the community currency exchange business and to *assure their financial stability*.

Par. 31 (sec. 1) defines a community currency exchange as "any person, firm * * * except * * * banks * * * engaged

at a fixed and permanent place of business, in the business * * * of * * * cashing checks * * * for a fee * * *, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services."

Par. 34.1 (sec. 4.1) defined community as a locality where there may or can be available to the people thereof the services of a community currency exchange reasonably accessible to them, and prohibited the issuance of a license that would not promote the convenience and advantage of the community.

Par. 35 (sec. 5) required performance bonds ranging from $3,000 to $25,000 for the benefit of creditors of the currency exchange.

Par. 36 (sec. 6) required insurance policies ranging from $2,500 to $35,000 against loss by burglary, larceny, robbery, forgery, or embezzlement.

Par. 37 (sec. 7) required that each exchange have a minimum of $3,000 cash available at all times, exclusive of funds received for exchange or transfer, and in addition, sufficient liquid funds on hand to pay on demand all its outstanding money orders.

Par. 38 (sec. 8) provided that an exchange must be an entity, financed and conducted as a separate business unit.

There are over 607 licensed community currency exchanges in Illinois. (Rec. 293; Defs.' Ex. 7, Rec. 96, 289) For the fiscal year ended in 1952, they issued almost half a billion dollars of their money orders. Their assets ex-

cooled 15 million dollars, and their furnished performance bonds covering 91.7% of their average money order liability. (Defs.' Ex. 7, Rec. 96, 399, 400, 401)

Into this environment, and in the face of such a pronounced state public policy to protect the people of Illinois against worthless money orders, and financially irresponsible operators, appellees, a limited partnership under the name of Bondified Systems, and its agent, a druggist, injected their money order business in 1953, and seek to nullify that policy by proposing to establish, on an investment of $10,000, without state license or regulation, 500 or more agencies in Illinois for the sale of their *personal* money orders (Rec. 19) under the name of Bondified, upon representations imprinted on their money orders that they "operated under license granted" them, and that the money transfers were "licensed" and "bonded." (Defs.' Exs. 1, 4, 5, Rec. 96, 258; Pltfs.' Ex. 14, Rec. 96, 218)

Bondified Systems

The history and activities of appellees, who claim they are comparably situated, and in the same class, with American Express, are entitled to notice.

On May 18, 1953, appellees Dodd, McDonald and Carlson organized Currency Services of Illinois, Inc., a Minnesota corporation, on a stated capital of $10,000 to manufacture, sell and distribute money orders, and other currency services materials, and to appoint agents in Illinois to sell and distribute money orders and other materials. (Defs.' Ex. 2, Rec. 96, 259, 260)

Their application for a license to do business in Illinois was denied. (Pltfs.' Exs. 1; 2, Rec. 95, 126, 127)

They then changed their corporate name to Bondified Systems, Inc., amended their articles of incorporation to

preclude their conduct of a currency exchange business (Defs.' Ex. 2, Rec. 96, 259, 266), and on July 30, 1953, secured a certificate of authority to do business in Illinois, which expressly prohibited it from engaging in the currency exchange business. (Defs.' Ex. 3, Rec. 96, 269, 272)

Under date of August 6, 1953, the corporation received a franchise from Checks, Inc., a Minnesota corporation, to sell to the public directly and through agencies to be appointed by Bondified Systems, Inc., in certain areas in Illinois and Indiana, "Bondified" money orders, a name apparently originated by Checks. Bondified agreed to capitalize with not less than $40,000 paid in. (Pltfs.' Ex. 5, Rec. 95, 135)

Checks, Inc. was capitalized at $50,000 (Defs.' Ex. 6, Rec. 96, 277, 287), and its principal interest in granting the franchises was the revenue it derived from the printing and sale of the money order blanks and other materials and advertising copy. (Pltfs.' Ex. 5, Rec. 135, 136, 138)

Under date of August 15, 1953, Bondified Systems, Inc. assigned to appellees, Doud, McDonald and Carlson, who organized a limited partnership called Bondified Systems (Pltfs.' Ex. 3, Rec. 95, 128), that part of the franchise relating to Illinois. (Pltfs.' Ex. 6, Rec. 95, 143)

On November 14, 1953, the Bondified corporation and the Bondified partnership, by an agreement signed on behalf of each by the same appellees, completely unified their businesses as one entity only, with the same office, same books, same operating employees, same bank accounts, same employee tax returns and related operational elements. The partnership would be the operating agent of the corporation in Indiana. Thirty thousand dollars of the money appellees were to pay for their stock in the corporation was to be diverted to their partnership. (Pltfs.' Ex. 10, Rec. 169)

Three bank accounts were opened: the Bondified corporate account; the partnership special account; and the partnership operating account. (Rec. 61, 62; Pltfs.' Ex. 8, Rec. 95, 157, 159, 161) The special account, out of which the money orders were to be paid, was to be commenced with an initial deposit of $10,000. (Pltfs.' Ex. 8, Rec. 95, 157, 158)

The corporation commenced business in Indiana November 9, 1953. During its first year, it appointed 120 agents there, and sold $1,140,000 of money orders. (Rec. 52, 64) At the end of that period, there was only $38.10 in the corporate bank account. (Rec. 57, 61)

There was approximately $4,000 in the operating account. (Rec. 62)

There was $22,827.53 in the special account the day before the trial, November 30, 1954 (Rec. 62); but none of appellees knew the amount of their outstanding unpaid money orders (Rec. 49, 75). Nor did they know what part of these accounts belonged to the corporation and the partnership respectively. (Rec. 66)

The corporation "siphoned" into the partnership $15,000 or $16,000 that has not been repaid. (Rec. 47, 65) Thirty thousand dollars of appellees' stock subscriptions were diverted to the partnership. (Rec. 46) This has not been repaid.

They have no other assets except some office equipment and stationery. (Rec. 66)

Thus the corporation has only a few dollars. The partnership owes the corporation at least $45,000, and has about $27,000 in their operating and special accounts, against which there is an undisclosed amount of outstanding unpaid money orders.

Appellees do not "bond" their money orders. The only bonds disclosed were: (1) a $10,000 bond "given their bank to protect it against overdrawal." (Pltfs.' Ex. 9, Rec. 95, 163); (2) a $1,000 fidelity bond given by their agent to protect them against his fraud or dishonesty (Pltfs.' Ex. 13, Rec. 95, 186-190); (3) a $10,000 bond indemnifying them against loss resulting from dishonesty or fraud committed by any employee (Pltfs.' Ex. 7, Rec. 95, 147-155). It will be noted that there was no performance bond for the benefit of money order purchasers, as required by par. 35 (sec. 5) of the statute, and that appellees Doud, McDonald and Carlson were not in any way bonded for the protection of the public dealing with them and their agent.

Despite the foregoing evidence testified to by appellees themselves, the court below "were persuaded by the plaintiffs' sincerity," and said that "the plaintiffs, who have adopted a number of precautionary measures to *insure protection of their customers*, have no opportunity to prove their trustworthiness." (Appendix X.)

American Express Company

American Express was organized in 1868 under the laws of New York as an unincorporated joint stock association with a worth then of 18 million dollars. It has a board of directors; officers; shareholders; a stock transfer book and agent; an executive committee; and substantially all other corporate amenities. (Defs.' Deposition Exs. 1, 2, 3, Rec. 96, 389, 400, 434.)

Its assets now exceed a half a billion dollars. (Rec. 466.)

It is a worldwide institution of vast ramifications and proportions engaging in such activities as world-wide travel service, foreign remittances, domestic money orders, travelers' checks, and importing and exporting ship-

ments. As a depositary of the federal treasury, it submits to government surveillance and furnishes periodical financial reports. Its wholly owned subsidiary is licensed by the New York State Banking Department. It has a network of 309 offices all over the world, of which 63 are in this country. (Rec. 320, 321, 322, 335, 341, Defs.' Deposition Exs. 4 to 13, Rec. 96, 438-502.) Its principal office is in New York City. (Rec. 327.)

When the bank holiday was declared in 1933, the company received special permission from the Treasury Department to stay open; it shipped, via airplanes, currency all over the Country, and paid all its obligations in cash. (Rec. 326, 327.)

It started selling its money orders in 1882, and has never defaulted in the payment of its obligations. (Rec. 325, 363.) It has survived every financial depression.

It operates several offices in Illinois, where it was doing business long before the Currency Exchange Statute was passed. (Rec. 336, 337.) It maintains well over 2 million dollars on deposit in 14 Illinois banks. (Rec. 327.)

The court below said of it: "It is further suggested * * * that the exemption merely reflected the high integrity and financial responsibility of American Express which is unique in its field. No one denies these facts." (Appendix A.)

On its original decision, the majority of the lower court held that the constitutional question could not be decided in the absence of an authoritative determination by the Illinois Supreme Court. 127 F. Supp. 853, 856. (Appendix B.)

In its present decision after the remand, the District Court, without expressly passing on the point, concluded that the inclusion in the statute of one engaged solely in the money order business, coupled with the exemption of

American Express engaged in that very business, rendered the statute discriminatory as to appellees engaged solely in that business but not in the "ordinary" business of a currency exchange. (Appendix A) The characterization "ordinary" appears nowhere in the statute.

Summary of Argument

The decisions of this Court leave no doubt of the validity of the exemption. Whether the statute denied appellees equal protection depends upon whether it was an arbitrary and unreasonable distinction for the legislature to make; and the burden was upon appellees to show such was the fact. The record is void of any showing in that regard. That there are towering differences between appellees and American Express Company relevant to the legislative purpose cannot be denied and was undisputably proved. The Illinois legislature had the right to believe that the evil sought to be curbed, namely, the sale of worthless money orders by financially irresponsible persons, did not exist in the case of American Express as it did in the case of local operators who, like appellees here, often operated on a shoestring, and that the public interest would be no more advanced by bringing that company under the statute than it would by bringing the Postoffice and banks and telegraph companies under it. The Constitution does not prohibit exemptions inflexibly and always. The problem is a local one and in the last analysis one of legislative policy, with a wide margin of discretion conceded to the lawmakers.

The lower court emphasized that appellees are not engaged in the "ordinary" business of a currency exchange, a distinction that conflicts with the plain language of the statute. It rejected the controlling Illinois decisions and the public policy of that state as additionally manifested by later statutory amendments which postdated the Wis-

consin decision upon which the lower court based its action. The need of a determination by the Illinois Supreme Court, as originally decided by the majority of the court below, would seem to be still present, and the parties should have been remitted to the state courts.

The Illinois Supreme Court has never decided whether the exemption, if invalid, is severable.

Appellees came into equity with unclean hands because of false representations imprinted on their money orders that they "operated under license granted" them, and their "money transfer" was "licensed" and "bonded", and because of the indiscriminate use of their tradename "Bondified" by owners of independent money order businesses in various states not responsible for each other's liabilities and acts.

There was no evidence of irreparable injury, clear, great and imminent, and of such exceptional circumstances as would entitle appellees to federal injunctive relief. They commenced their business in 1953 with full knowledge that the statute prohibited them from so doing, and according to their own evidence, it is insolvent. Any loss they may have sustained, if any at all, was not due to appellants' conduct, and could have been obviated in large measure by appellees themselves.

ARGUMENT

I.

The Illinois Currency Exchange Statute, as amended, did not deny appellees the equal protection of the laws.

Whether the statute denied appellees equal protection depends upon whether it was an arbitrary and unreasonable distinction for the legislature to make between American Express and them; and the burden was upon them to show such was the fact. The record is void of any showing in that regard except one sole circumstance: they sell their money orders through agents located in retail stores much as does American Express. There the similarity ends. Even the context of the money orders they sell is radically different.

That there are towering differences between American Express and appellees as to solvency, size, financial responsibility, security, business and monetary facilities, age, experience, history, governmental surveillance, and any other thing having any relation to the protection of the public from loss, is not and cannot be denied. In fact, appellees' counsel admitted upon the trial that American Express "is a large, solvent, great organization, world wide" (Rec. 104), and the court below made a similar observation. (Appendix A)

Wedesweiler v. *Brundage*, 297 Ill. 228, so strongly relied upon by the Wisconsin federal court, expressly made the point we seek to emphasize here, that if the exemption there was predicated upon anything "having any relation to the protection of the public from loss by reason of the dishonesty, incompetence, ignorance or irresponsibility of

persons in that business," it would have been held valid (Rec. 237).

The test of equal protection is not whether the businesses are in any respect similar, but whether the similarity is relevant to the legislative purpose. The similarity in the manner of selling money orders through agents located in retail stores certainly affords no protection to the public, and bears no relevancy at all to the legislative purpose.

The legislature had the right reasonably to believe that the money orders of American Express were so much safer than those issued by the class of local operators of which appellees constitute a part, that their exemption like that of the banks and telegraph companies, was warranted.

That appellees compete with American Express does not prove they are comparably situated any more than it proves that the "ordinary" currency exchanges are comparably situated because they likewise compete with American Express—a point both the Wisconsin and Illinois federal courts seemed to have lost sight of. "Mere competition between them is not enough to show two concerns must be burdened alike" in relation to the equal protection clause. *Union Bank & Trust Co.* v. *Phelps*, 288 U. S. 181, 186.

Nor is it tenable to indulge in speculation as to the future financial responsibility of American Express, as did the Wisconsin court. The legislature "need not take account of new and hypothetical inequalities that may come into existence as time passes or conditions change." *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 84. Should the financial condition of American Express change, the legislature could revoke the exemption, or the courts could invalidate it. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 547, 548.

Appellees stress the high cost of the regulation that would be imposed upon them by the statute while American Express is not subjected thereto. But the rule of equality permits many practical inequalities, *New York etc. Corp. v. New York*, 303 U. S. 573, 578, and an otherwise valid statute conferring a privilege is not rendered invalid because particular persons find it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend, *Gant v. Oklahoma City*, 289 U. S. 98, 103, or because of their own failure to enjoy the benefits conferred by the statute as freely as they may, by limiting their business to the performance of only one of the services permitted by the statute, *Aero-Mayflower Transit Co. v. Georgia*, 295 U. S. 285, 289.

A closely analogous case is *Engle v. O'Malley*, 219 U. S. 128. The New York statute there prohibited the business of receiving money for safekeeping or transmission, without a license, and the making of a large deposit and filing of a large bond with the state comptroller, but exempted express and telegraph companies, and persons in the business who received during the preceding year deposits averaging not less than a fixed amount. This Court held the exemptions did not deny equal protection, and speaking through Mr. Justice Holmes said, pp. 137, 138:

> "It is true, no doubt, that where size is not an index to an admitted evil, the law cannot discriminate between the great and the small. But in this case, size is an index."

Individual exemptions excluding companies by name are not violative of equal protection, where a reasonable basis therefor exists. Squarely in point is: *Williams v. Baltimore*, 289 U. S. 36, 42, 46. Other cases are: *Erb v. Morasch*, 177 U. S. 584; *Tonota v. Hawaii*, 226 U. S. 184; *New York v. Zimmerman*, 278 U. S. 63; *Salzburg v. State of Md.*, 346

U. S. 557; and Mr. Justice Holmes' opinion in *Interstate Consol. St. Ry. Co.* v. *Mass.*, 207 U. S. 78, 85.

Statutory discrimination between situations which are in fact different must be presumed to be relevant to a permissible legislative purpose. *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 215, and will not be deemed to be a denial of equal protection if any state of facts could be reasonably conceived which would support it. *Metropolitan Cas. Ins. Co.* v. *Brownell*, 294 U. S. 580, 584; *South Car. State H. Dept.* v. *Barnwell*, 303 U. S. 177, 191. Situations which are different in fact or opinion are not required by the Constitution to be treated as though they were the same. *Goesaert* v. *Cleary*, 335 U. S. 464, 466.

There is no doctrinaire requirement that legislation should be couched in all-embracing terms. The legislature is free to recognize degrees of harm and may confine its restrictions to that class where the need is deemed to be the clearest. The relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400.

The reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field, and regulate it, neglecting the others. *Williamson* v. *Lee Optical of Okla.*, 348 U. S. 483, 488, 489, and may direct its law against what it deems to be the evil as it actually exists, nonetheless that the forbidden act does not differ in kind from those that are allowed. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 556, 557; *Hughes* v. *Superior Court*, 339 U. S. 460, 468. The equal protection clause does not mean that all occupations called by the same name, must be treated in the same way. *Dominion Hotel* v. *Arizona*, 249 U. S. 265, 268.

The District Court stated that "the difficulty with this Act is that it denies everyone but American Express the opportunity to demonstrate financial responsibility or the adoption of adequate safeguards to protect the public." (Appendix A) There are several answers thereto.

This Court has uniformly rejected the efforts of litigants to attack legislation on the ground that the rights of others are violated. This litigation is confined to appellees' rights; and does not involve the rights of everyone but American Express.

Moreover, "where a line or point has to be fixed and there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." Mr. Justice Holmes in *Louisville Gas & Elect. Co. v. Coleman*, 277 U. S. 32, 41.

Some latitude must be allowed for the legislative appraisement of local conditions, *Dominion Hotel v. State of Arizona*, 249 U. S. 265, 268; *Patson v. Pa.* 232 U. S. 138, 144 (pointed out in *McDougall v. Lauder*, 389 Ill. 141, 151, but rejected in the decisions of the court below and the Wisconsin courts), and for the legislative choice of methods for controlling an apprehended evil. Even if we were to assume that appellees are not engaged in an objectionable enterprise (an assumption not based on a realistic appraisal of the records), the legislature was not required to confine its regulation to only the objectionable members of a class and select them by more empirical methods. *Ohio v. Dockelbach*, 274 U. S. 392, 397. If a statute of this character must be considered with reference to the particular circumstances affecting each currency exchange, it might lead to the absurdity of its being held valid in one case and invalid in another. *People v. Eberding*, 254 Ill. 579, 587.

The District Court below criticized par. 38 (sec. 81) of the statute which requires a currency exchange to be conducted as a separate business because it "cannot be reconciled with standards of financial responsibility" (Appendix A). The purpose of that section was to prevent the commingling of funds belonging to the currency exchange business and those from other sources, which the legislature had the right to believe was an unsafe financial practice, to the end that the misfortunes or exigencies of other business may not be visited on the money order funds. It was merely incidental to the regulation of the currency exchange business. *Gadlin v. Auditor of Public Accounts*, 414 Ill. 89, 94. It was for the legislature to decide what regulations were needed to reduce the evils of that business to the minimum, and it was not required to adopt the most conservative course. *Queensside Hills Co. v. Saal*, 328 U. S. 80, 83.

As to the avoidance of process upon American Express, we point out that the company could be sued and served in Illinois as a *de facto* corporation. *Dugan v. Int. Ass'n.* 202 Ill. App. 308, 309; *Sprains v. Draggists*, 232 Ill. App. 427, 429; *Fitzpatrick v. Rutter*, 160 Ill. 282, 286. Since January 1, 1956, secs. 13.4 and 27.1 of the revised Illinois Civil Practice Act expressly permit suit and service against a partnership in its firm name, and secs. 16 and 17 provide for personal service outside the state on persons of other states transacting business within Illinois. Ill. Rev. Stat. 1955, Chap. 110, pars. 13.4, 16, 17, 27.1.

As to the federal courts, Federal Rules 4 (d) (3) and 4 (d) (7) apply. *Wilson & Co. v. W. P. W.*, 83 F. Supp. 162, 166, 167 (S. D. N. Y.); *Bushy v. Electric Union*, 147 F. (2) 865, 867 (App. D. C.); *Operatives, etc. Ass'n. v. Case*, 93 F. (2) 56, 65-68 (App. D. C.).

From the foregoing survey, it would seem evident that the contention of repugnance to the equal protection clause has met with little favor at the hands of this Court. Mr. Justice Holmes called it the "usual last refuge of constitutional arguments." *Buck* v. *Bell*, 274 U. S. 200, 208. Mr. Justice Jackson said that "while claims of denial of equal protection are frequently asserted, they are rarely sustained." *Railway Express* v. *New York*, 336 U. S. 106, 111. And in Constitution of the United States of America, Analysis and Interpretation, published in 1953 by the Legislative Reference Bureau, Library of Congress, it was said (p. 1153) that "except where discrimination on the basis of race or nationality is shown, few police regulations have been found unconstitutional on this ground."

We would be content to submit this appeal on the constitutional issue alone; but we are not empowered to waive the following secondary questions involved here, questions which this Court may raise and consider *sua sponte*. *Douglas* v. *Jeannette*, 319 U. S. 157, 162; *Neese* v. *Southern R. Co.*, 350 U. S. 77, 78.

II.

The Illinois courts have never passed upon the precise legal questions presented here, and the parties should have been remitted to those courts.

The court below emphasized that Appellees are not engaged in the "ordinary" business of a currency exchange, a distinction that sharply conflicts with the plain language of the statute, and one that according to the majority opinion originally rendered, required authoritative determination by the Illinois Supreme Court, 127 F. Supp. 853, 856. The court below repudiated the McDougall decision, 389 Ill. 141, and disregarded later state Supreme Court deci-

sions and later legislative enactments which pointed up the validity of the McDougall decision.

The lower court in its last opinion said that the Illinois Supreme Court did not appear to have had occasion to consider the full extent of the Act's discriminatory effect. (Appendix A) This Court's decision did not pass on the point. 350 U. S. 485. The need of such a determination by the State Supreme Court, which is now magnified by the District Court's ruling, would seem to be still present in the case, *Federation of Labor* v. *McAdory*, 325 U. S. 450, 451; *C. I. O.* v. *McAdory*, 325 U. S. 472, 477; *Railroad Comm.* v. *Pullman Co.*, 312 U. S. 496, 499, 500, and the parties should have been remitted to the state courts. *Stainback* v. *Mo Hock*, 336 U. S. 368, 383.

Moreover, the Illinois Supreme Court has never decided whether the severability clause in par. 563 (sec. 30) of the statute in question would be so applied as to remove the alleged discrimination. Despite the language in the *McDougall* decision, 389 Ill. 141, 151, that the legislature would never have passed the act if they thought the exempted companies would be made subject to it, that case did not pass upon the question of severability because it upheld the exemption. The language in question was intended, we believe, to emphasize the difference between the exempted companies and the local exchanges. Severability is a question that might be more appropriately left for adjudication to the Illinois Supreme Court. *Liggett* v. *Lee*, 288 U. S. 517, 541.

III.

Appellees came into equity wth unclean hands.

Appellees came into equity with unclean hands because of their false representations imprinted on their money orders that they "operated under a license granted" them, and that their "money transfer" was "licensed," and "bonded." (Defs.' Exs. 1, 4, 5, Rec. 96, 258; Pltfs.' Ex. 14, Rec. 96, 218). The natural effect of such language in Illinois, especially when accompanied by such language on the stub as "Pay your bills here," strongly indicative of a currency exchange (Rec. 90, 93), was bound to mislead and deceive the public, and appellees cannot be heard to deny their intention of so doing. *Preservaline Mfg. Co. v. Heller Chemical Co.*, 118 F. 103, 105, 106 (N. D. Ill.) These representations would enable them to profit by the legislation without paying the cost of regulation. Cf. *Kau v. U. S.*, 303 U. S. 1, 6; *Rescue Army v. Municipal Court*, 331 U. S. 549, 569; *Ashcander v. Valley Authority*, 297 U. S. 288, 348.

Also, the indiscriminate use of the name "Bondified" by owners of independent money order businesses not responsible for each other's liabilities and acts, the name being impressed upon the public through a course of unified advertising, is a continuing misrepresentation of the ownership of the business and the financial responsibility thereof. (Rec. 71, 74, 75) *Morton Salt Co. v. Suppiger*, 314 U. S. 488, 494; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 224; *Worden & Co. v. Cal. Fig Syrup Co.*, 187 U. S. 516, 528.

Any wilful conduct, not necessarily sufficient to be punishable as a crime or to justify legal proceedings, which can be said to transgress equitable standards of conduct, is su-

ficient to constitute unclean hands; and the doctrine assumes wider and more significant proportions where a suit concerns the public interest, for then it averts injury to the public. *Precision Co.* v. *Automotive Co.*, 324 U. S. 806, 814, 815.

The question is one that might appropriately be left to state court determination, for it involves local law. *Ford* v. *Caspers*, 128 F. (2) 884, 885 (C. A. 7); *De Sylva* v. *Ballentine*, 351 U. S. 570, 580; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 172, 173.

IV

There was no evidence of such exceptional circumstances as would entitle appellees to federal injunctive relief.

There was no evidence of irreparable injury, clear, great and imminent. The *only* showing made in that regard was that several months before appellees commenced the sale of their money orders, an employee in the State Auditor's office told them that the office would stand back of the law. (Rec. 41) There was no showing here even of a threat of a single suit. The employee's assertion was not directed against any particular conduct, inasmuch as appellants were not apprised of any violation until the amended complaint was filed, May 5, 1954. (Rec. 29)

This does not constitute irreparable injury. *Watson* v. *Buck*, 313 U. S. 387, 400; *Douglas* v. *Jeannette*, 319 U. S. 157, 162, 163; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45, 50. The penalties in the statute are not so severe as to intimidate against a contest of its validity. *Rast* v. *Van Deman*, 240 U. S. 342, 368. Any moneys paid the Auditor under the statute could later have been recovered if paid under protest and the statute were held unconstitutional. Ill. Rev. Stat. 1955, Chap. 127, pars. 172, 172a.

Appellees commenced their business in Illinois in 1953 with full knowledge of the Illinois statute. (Pltfs.' Ex. 23, Rec. 95, 247). Their position was not like that of a successful business which suddenly finds its very existence threatened by exceptional circumstances of a very serious nature. Such loss, if any, as appellees may have sustained was not due to the conduct of appellants, and could have been obviated by appellees themselves, if they so desired, pending a full hearing in the state courts, with ample opportunity for ultimate review by this Court of the constitutional issue.

Conclusion.

This Court has said many times that the history of federal equity jurisdiction is the history of regard for public consequences and that few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. *Railroad Comm. v. Pullman Co.*, 312 U. S. 496, 499, 500.

We believe the decision of the District Court lost sight of that important principle.

The decree of the court below should be reversed, or reversed and remanded with appropriate directions.

Respectfully submitted.

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APPENDIX A

The Opinion Below

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 53 C 2322

GEORGE W. DOUD, DONALD Q. MCDONALD, and J. WESLEY CARLSON, doing business as BONDIFIED SYSTEMS, and EUGENE DERRICK, Plaintiffs

v.

ORVILLE HODGE, Auditor of Public Accounts of the State of Illinois, LATHAM CASTLE, Attorney General of the State of Illinois, and JOHN GUTKNECHT, States Attorney of Cook County, Illinois, Defendants

OPINION - June 12, 1956

Before ELMER J. SCHNACKENBERG, Judge of the United States Court of Appeals for the Seventh Circuit, WALTER J. LA BUY and JULIUS J. HOFFMAN, District Judges.

HOFFMAN, District Judge. The plaintiffs, George W. Doud, Donald Q. McDonald and J. Wesley Carlson, a partnership doing business as Bondified Systems, and Eugene Derrick, agent of said partnership, seek to enjoin the defendants from enforcing the provisions of the Illinois Community Currency Exchange Act (Ill. Rev. Stat. 1955, c. 16½, §§ 30-56.3) against them on the ground that it violates the Fourteenth Amendment to the federal constitution in that it discriminates unlawfully against them and in favor of the American Express Company. The defendants are the Auditor of Public Accounts of the State of Illinois, the Attorney General of the State of Illinois, and the State's Attorney of Cook County, Illinois.

After all of the evidence was heard, this court, pursuant to a memorandum of February 4, 1955, dismissed the complaint for want of jurisdiction. Brief findings of

fact and conclusions of law were entered on February 9, 1955. Our order dismissing the complaint was reversed by the Supreme Court, 350 U. S. 485 (March 26, 1956), which remanded the case to us. Having considered the evidence and the briefs previously filed by the parties, we are ready to determine whether or not the plaintiffs are entitled to the relief they seek.

The Illinois Currency Exchange Act establishes a system of regulation of currency exchanges throughout the state and requires, among other things, a license, the payment of fees, bonds, insurance, annual reports, etc. The provisions of the Act apply to all community currency exchanges as that term is defined in § 31 of the Act. It is in the definition of a currency exchange, however, that the alleged discriminatory provision appears. Section 31 provides:

> "'Community currency exchange' means any person, firm, association, partnership or corporation, . . . engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, *or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders other than* United States Post Office money orders, *American Express Company money orders*, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders, or engaged in both such businesses, or engaged in performing any one or more of the foregoing services." (Emphasis added.)

The plaintiffs, who sell "Bondified" Post Card Checks and Money Orders under a license from Checks, Inc.,* a Minnesota corporation which owns the registered trade mark, contend, and the evidence sustains, that they operate their business in substantially the same manner as that of

* The license agreement with Checks, Inc., was entered into by the corporation organized by the three plaintiffs, Bondified Systems, Inc. In accordance with its terms, however, the license was assigned to the partnership formed by the same three persons.

the American Express Company (i.e., they confine their operations to selling and issuing money orders, and this business is conducted through authorized agents,** located principally in retail establishments such as drug and grocery stores. Yet the plaintiffs are unable to operate lawfully under the Act since § 38 prohibits a currency exchange from being conducted as a part of another business; and even if they could overcome this obstacle, they would be required to obtain a separate license for each agency and to pay the numerous license and inspection fees for each outlet. American Express, on the other hand, is relieved of all these burdens.

The defendants have raised several preliminary matters in addition to the point previously dealt with by this court and the Supreme Court. Defendants claim that the plaintiffs may not invoke the equitable powers of this court because they have not come into equity with clean hands. For this they rely on two matters: (1) On the partnership money order from the word "Licensed" appears at the bottom of the form in small letters opposite the word "Bonded." This is said to amount to a fraud on the public by implying that plaintiffs are licensed under the Illinois Currency Exchange Act; (2) The operation by the partnership under a license from Checks, Inc., is said itself to constitute a fraud because no license of a trade mark may be made unless accompanied by a transfer of the business.

The defense of unclean hands could be summarily disposed of by reference to a similar charge made in *Toomer v. Witsell*, 334 U. S. 385 (1948). The Supreme Court noted that some of the plaintiffs had previously been convicted of violations of the statutes whose validity they attacked.

> "The District Court held that this previous misconduct, not having any relation to the constitutionality of the challenged statutes, did not call for application of the clean hands maxim. We agree." 334 U. S. at

** Plaintiffs, in recognition of the fact that they cannot operate legally under the Illinois Act, have established to date only one agency in this state although they have 120 in operation in Northern Indiana.

393; and see opinion of the District Court, 73 F. Supp. 371, 374 (E. D. S. Car. 1947)

Since the defendants vigorously urge this point, we will go beyond the short answer. While the use of the word "Licensed" might appear ambiguous to us, no evidence was introduced to show that the public is enticed into purchasing Bondified Money Orders by reason of their belief that the plaintiffs hold a license under the Currency Exchange Act. Moreover, we were persuaded by the plaintiffs' sincerity in explaining that they intended the expression to refer to a license from Checks, Inc., to handle Bondified Money Orders. This conduct is clearly not of such a nature as to bar the plaintiffs from relief.

With respect to the license of the trade mark "Bondified" from Checks, Inc., defendants contend that the attempt to license the use of a trade mark without a concurrent transfer of the business itself was ineffective and a fraud. Even if it is assumed that the same principles apply to service marks as to ordinary trade marks, a license may be made of a mark other than as an incident of a transfer of business so long as the agreement is not merely a "naked" license agreement. *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America*, 167 F. 2d 848 (Ct. Customs & Patent App. 1948; decided without benefit of the liberalizing provisions of the Lanham Act). In that case the court approved an agreement under which the licensor established certain standards for the licensee to follow in making the product under the assigned trade mark. A trade mark license is valid if it provides for "supervisory control of the product or services." *Arthur Murray, Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953). The "Operator Contract" (Pltf. Ex. 5) between Checks, Inc., and Bondified Systems, Inc., through which the plaintiffs are authorized to deal in Bondified checks and money orders, contains numerous controls and standards which Bondified Systems and its agencies must meet and is much more than a "naked" license agreement.

The plaintiffs have, we believe, sufficiently demonstrated the imminence of irreparable injury, entitling them to injunctive relief. See *Toomer* v. *Witsell*, 334 U. S. 385, 391-92 (1948). While the defendants allege that their threats to enforce the Act were general and call attention to the fact that they have taken no legal action against the plain-

tiffs,* they concede that plaintiffs will be required to qualify under the Act and that they will enforce it against plaintiffs when the latter violate it, which admittedly they are doing now. The defendant officials were not apprised of a violation until shortly before plaintiffs filed their complaint. To operate as a currency exchange without first securing a license subjects the plaintiffs to a criminal prosecution and the penalty of a heavy fine, or imprisonment, or both. In the meantime the plaintiffs, presumably to avoid further possible penalties, are withholding establishment of additional agencies and losing the opportunity to conduct and expand their business.

We turn now to the constitutional validity of the Currency Exchange Act as applied to these plaintiffs. In *Currency Services, Inc.* v. *Matthews*, 90 F. Supp. 40 (W. D. Wis. 1950), a federal three court enjoined enforcement of the Wisconsin currency exchange statute, which was virtually identical to the Illinois statute, on the ground that it violated the equal protection clause of the Fourteenth Amendment. The plaintiff in the *Matthews* case, like these plaintiffs, engaged only in the business of issuing money orders. The Wisconsin court held:

> "It is the inclusion, in the definition of the term 'community currency exchange', of one who, though not engaged in the check-cashing business ordinarily designated by that term is 'engaged in the business of selling or issuing money orders', coupled with the exemption of a company engaged in that very business, which, it seems to us, renders the statute discriminatory and unconstitutional as applied to the plaintiff corporation or to any other person or firm engaged in the business

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* The State's Attorney of Cook County contends that he should not be made a party to this proceeding because the plaintiffs' only agency operating at the moment is not located in Cook County, the territorial limit of his authority. The injunctive relief requested, however, is intended to prevent interference with operation of plaintiffs' business in the future. Moreover, the plaintiffs themselves are located in Cook County, and any attempts to enforce the Act would have to be directed primarily against them in that jurisdiction.

> of selling or issuing money orders but not in the ordinary business of a currency exchange." 90 F. Supp.

We approve the reasoning and conclusions of the Wisconsin court and see no reason to depart from them in this case.

The fact that the constitutionality of the Illinois Act was previously sustained by the Illinois Supreme Court in *McDougall* v. *Lueder*, 389 Ill. 141 (1945), is not conclusive. A close examination of the *McDougall* opinion discloses that the court based its conclusion that the classification was reasonable on the ground that the legislature was concerned only with regulating local community exchanges, as opposed to world-wide operations. This point was answered in the *Matthews* case:

> "While it is true that American Express operates on a world-wide scale, this does not alter the fact that its Wisconsin operations are not at all different from those contemplated by plaintiff corporation and would be subject to the provisions of the statute if carried on by any one other than American Express or its agents." 90 F. Supp. at p. 44.

While we accord great respect to the views of the Illinois Supreme Court, it does not appear that that court had occasion to consider the full extent of the Act's discriminatory effect. Moreover, it is difficult to accept the attempt to explain the exemption of American Express on the basis that regulation of that company is not required in order to protect local interests. The evidence here, while not entirely clear, tends to show that American Express has no license to transact business in this state, is not subject to any form of state regulation, does not always require bonds of its agents, as plaintiffs do, and may even be able successfully to avoid service of process by the courts of this state.

It is further suggested that the real purpose of the Act was to eliminate irresponsible fly-by-night companies, and the exemption merely reflected the high integrity and financial responsibility of American Express which is unique in its field. No one denies these facts. Nor do we suggest that the legislature could not establish reasonable standards of financial responsibility which all would be required to meet to qualify for an exemption. But the difficulty with this Act is that it denies everyone but American

Express the opportunity to demonstrate financial responsibility or the adoption of adequate safeguards to protect the public. The plaintiffs, who have adopted a number of precautionary measures to insure protection of their customers, have no opportunity to prove their trustworthiness. Moreover, at least one of the provisions of the Act cannot be reconciled with standards of financial responsibility. Under § 38 the plaintiff Derrick, who has an established Bondified agency, is prohibited from selling Bondified money orders in connection with his drug store business, but he was permitted to sell American Express money orders at the same store in 1948 and 1949. This restriction exists quite apart from the requirements of licensing and fees. While the plaintiffs have only begun their business,* other Bondified licensees have operated for ten years or more and have conducted a substantial and, so far as this record shows, a responsible business. We are unable to find a reasonable basis on which to sustain the classification expressed in the Illinois Currency Exchange Act.

In view of the Illinois Supreme Court's statement in the *McDougall* case that "The General Assembly would surely never have passed the act if they had thought the said companies [i. e., American Express, Postal Telegraph and Western Union] would be made subject to its rules and regulations" (389 Ill. at p. 151), an injunction will issue restraining the defendants from enforcing the provisions of the Community Currency Exchange Act against the Plaintiffs, so long as they engage only in the business of issuing and selling money orders.

Counsel for the plaintiffs will prepare and submit to the court on or before June 15, 1956, findings of fact, conclusions of law and a judgment order in keeping with the views herein expressed.

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* Nevertheless, in their first year of operation the plaintiffs sold over $1,400,000 of money orders in Northern Indiana alone.

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

Before ELMER J. SCHNACKENBERG, Judge of the United States Court of Appeals for the Seventh Circuit, WALTER J. LABUY and JULIUS J. HOFFMAN, District Judges.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—June 18, 1956

This matter having come on to be heard before the court of three judges convened pursuant to 28 U. S. C. 2281 and 2284 upon the amended complaint filed by plaintiffs and the answers filed by the defendants, and the court having heard evidence presented in open court, having considered the evidence and arguments of counsel and being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

The Court finds:

1. The plaintiffs George W. Doud, Donald Q. McDonald, and J. Wesley Carlson, a partnership doing business as Bondified Systems, and Eugene Derrick, agent of said partnership, seek to enjoin the defendants Orville Hodge, Auditor of Public Accounts of the State of Illinois, Latham Castle, Attorney General of the State of Illinois, and John Gutknecht, State's Attorney of Cook County, Illinois, from enforcing against the plaintiffs the provisions of the Illinois Community Currency Exchanges Act, Sections 30-56.3 of Chapter 16½ of the Illinois Revised Statutes 1955, on the ground that it violates the Fourteenth Amendment to the Federal Constitution in that it discriminates unlawfully against them and in favor of the American Express Company.

2. The amount in controversy herein exceeds the sum of $3,000.00 exclusive of interest and costs.

3. The partnership of plaintiffs Doud, McDonald and Carlson is organized to engage, and has been engaging, not in the ordinary business of a currency exchange, but exclusively in the business of selling and issuing money orders

through agents who are principally persons engaged in operating retail stores.

4. The plaintiffs sell "Bondified" postcard checks and money orders under a license from Checks, Inc., a Minnesota corporation which owns the registered trademark, and they operate their business in substantially the same manner as that of the American Express Company, in that they confine their operations to selling and issuing money orders, and this business is conducted through authorized agents located principally in retail establishments, such as drug and grocery stores. American Express Company, which is exempt from the operation of the Act is engaging in the same activity.

5. The plaintiffs Doud, McDonald and Carlson, in recognition of the fact that they cannot operate legally under the Illinois Act, have established to date only one agency in this state although they have 120 in operation in northern Indiana where in their first year of operation they sold over $1,400,000 of money orders.

6. On the partnership money order forms the word "Licensed" appears at the bottom of the form in small letters opposite the word "Bonded". Said plaintiffs intended the expression "Licensed" to refer to a license from Checks, Inc. to handle Bondified money orders, and no evidence was introduced to show that the public was enticed into purchasing the plaintiffs' Bondified money orders by reason of the belief that the plaintiffs were licensed under the Illinois Community Currency Exchange Act.

7. The "operator contract" through which the plaintiffs are authorized to deal in Bondified checks and money orders, contains numerous controls and standards which Bondified Systems and its agents must meet and is much more than a naked license agreement. The plaintiffs have adopted a number of precautionary measures to insure protection of their customers.

8. American Express Company is an aggregation of individuals operating under a joint stock company plan. It is not a corporation. It sells and issues money orders in the City of Chicago, Illinois, through operators of drug and grocery stores. The evidence tends to show that American Express Company has no license to transact business in this state, is not subject to any form of state regulation, does not always require bonds of its agents as

plaintiffs do, and may even be able successfully to avo service of process by the courts of this state.

9. The plaintiff Derrick, who has an established Bond fied agency, is prohibited by [illegible]38 of the Act from sellin Bondified money orders in connection with his drug sto business, but he was permitted to sell American Expres Company money orders at the same store in 1948 and 194

10. The defendants concede that plaintiffs will be re quired to qualify under the Act and that they will enforc it against the plaintiffs when the latter violate it, which ad mittedly they are doing now. The defendant officials wer not apprised of a violation until shortly before plaintiff filed their complaint. To operate as a currency exchang without first securing a license subjects the plaintiffs to criminal prosecution and the penalty of a heavy fine or im prisonment, or both. In the meantime, the plaintiffs, pre sumably to avoid further possible penalties, are withhol ing establishment of additional agencies and losing the op portunity to conduct and expand their business. The plain tiffs have demonstrated the imminence of irreparable in jury.

Conclusions of Law.

1. The Court has jurisdiction of the parties and of th subject matter of this proceeding.

2. The Illinois Community Currency Exchange Act es tablishes a system of regulation of currency exchange throughout the state and requires, among other things, a li cense, the payment of fees, bonds, insurance, annual re ports, etc. The provisions of the Act apply t all community currency exchanges as that term is define in [illegible]31 of the Act which defines "Community Currency Ex change" as "any person, firm, association, partnership o corporation * * * engaged at a fixed and permanent plac of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders, or any other evidence of money acceptable to such community cur rency exchange, for a fee or service charge or other con sideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any othe money orders (other than United States Post Office money orders, American Express Company money orders, Posta

Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services".

3. Plaintiffs are unable to operate lawfully under the Act since § 38 thereof prohibits a currency exchange from being conducted as a part of another business; and even though they could overcome this obstacle they would be required to obtain a separate license for each agency and to pay the numerous license and inspection fees for each outlet. American Express Company, on the other hand, is relieved of all these burdens.

4. The use by the plaintiffs of the word "Licensed" is clearly not of such a nature as to bar the plaintiffs from relief.

5. The trademark license under which the plaintiffs operate provides for supervisory control of the product or services and is valid.

6. It is the inclusion, in the definition of the term "Community Currency Exchange" of "one who, though not engaged in the check cashing business ordinarily designated by that term is "engaged in the business of selling or issuing money orders", coupled with the exemption of a company engaged in that very business which, it seems to us, renders the statute discriminatory and unconstitutional as applied to the plaintiffs or to any other person or firm engaged in the business of selling or issuing money orders but not in the ordinary business of a currency exchange. The Illinois Community Currency Exchange Act as applied to the plaintiffs violates the equal protection clause of the Fourteenth Amendment.

7. The plaintiffs are entitled to the issuance of an injunction restraining the defendants from enforcing the provisions of the Illinois Community Currency Exchange Act against the plaintiffs so long as they engage only in the business of issuing and selling money orders.

Elmer J. Schnackenberg, Julius J. Hoffman, Walter J. LaBuy.

Dated, June 18, 1956.

In the United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 53 C 2322

George W. Dovd, Donald Q. McDonald, and J. Wesley Carlson, doing business as Bondified Systems, and Eugene Derrick, Plaintiffs,

vs.

Orville Hodge, Auditor of Public Accounts of the State of Illinois, Latham Castle, Attorney General of the State of Illinois, and John Gutknecht, State's Attorney of Cook County, Illinois, Defendants.

Before Elmer J. Schnackenberg, Judge of the United States Court of Appeals for the Seventh Circuit, Walter J. LaBuy and Julius J. Hoffman, District Judges.

Decree—June 18, 1956

This matter having come on to be heard before the court of three judges convened pursuant to 28 U. S. C. § 2281 and § 2284, upon the amended complaint filed by plaintiffs and the answers filed by the defendants, and the Court having heard evidence presented at the trial and having considered the same, having heard arguments and received briefs of counsel, and having examined the opinion of the Supreme Court with respect to the jurisdiction of the court and being fully advised.

It is ordered, adjudged and decreed that the defendants be, and they are hereby, enjoined from enforcing the provisions of the Illinois Community Currency Exchanges Act (§ 30 to 56.3, Chap. 16½, Illinois Revised Statutes) against the plaintiffs so long as they engage only in the business of issuing and selling money orders; and

It is further ordered that the plaintiffs recover from the defendants their costs herein, including the costs adjudged by the Supreme Court, for which let execution issue.

Enter:

Elmer J. Schnackenberg, Julius J. Hoffman, Walter J. LaBuy.

Dated, June 18, 1956

APPENDIX B

THE OPINIONS BELOW

Opinion of the United States District Court, Northern District of Illinois, Eastern Division, Civil Action No. 53 C 2322, *George W. Doud, et al.* v. *Orville Hodge*, Auditor of Public Accounts, etc., *et al.* (127 F. Supp. 853.)

February 4th, 1955

Before Elmer J. Schnackenberg, *Judge* of the United States Court of Appeals for the Seventh Circuit, and Julius J. Hoffman and Walter J. LaBuy, *District Judges*.

Schnackenberg, *Circuit Judge*. Plaintiffs, George W. Doud, Donald Q. McDonald and J. Wesley Carlson, as a partnership, and plaintiff, Eugene Derrick, agent of said partnership, by their amended complaint seek an injunction restraining the defendants, who are the Auditor of Public Accounts and the Attorney General of the State of Illinois, and the State's Attorney of Cook County, Illinois, from enforcing against said plaintiffs the provisions of the Illinois Community Currency Exchange Act,[1] upon the ground that said act is unconstitutional in that, according to plaintiffs, it denies them the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Defendants filed answers and evidence was adduced by the respective parties.

An *amicus curiae* makes the contention (which has been adopted by the defendants) that the court has no jurisdiction to decide the question of constitutionality raised by plaintiffs because that question has never been presented to the Illinois Supreme Court, and hence the federal courts are without jurisdiction to determine it in the first instance, citing *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, at 104, and *Federation of Labor* v. *McAdory*, 325 U. S. 450, at 471:

[1] Secs. 30 to 56.3 inclusive, Chap. 16½, Ill. Rev. Stat. 1953.

The amended complaint alleges that the partnership is organized for the purpose of, intends to engage, and has been engaging, not in the ordinary business of a currency exchange, but exclusively in the business of selling and issuing money orders under the firm name "Bondified Systems" in the Counties of DuPage and Cook and other portions of the State of Illinois. That business is to be conducted through agents, who are principally persons engaged in operating retail drug, hardware and grocery stores.

It is also alleged by plaintiffs and proved by the evidence, that on August 11, 1953, they appointed the plaintiff Derrick (who conducts a drug store) as their agent for the sale to the public of postcard checks and money orders issued by the partnership firm.

Section 1 of the Act [2] provides in part:

> "§ 1. For the purposes of this Act: 'Community currency exchange' means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money order, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such business, or engaged in performing any one or more of the foregoing services."

Section 8 of said Act [3] provides in part:

> "§ 8. A community • • • currency exchange shall not be conducted as a department of another business. It must be an entity, financed and conducted as a separate business unit. • • •"

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[2] Sec. 31, Chap. 16½, *ibid.*

[3] Sec. 38, Chap. 16½, *ibid.*

Plaintiffs contend that the exemption of those engaged in the business of selling or issuing American Express Company money orders is "wholly unwarranted" and is "highly discriminatory."

Plaintiffs also contend that "the arbitrary, discriminatory character of" the Act "as applied to plaintiffs * * * engaged exclusively in the business of selling and issuing money orders is further illustrated by the exemption from said statute of sale of American Express Company money orders by persons, firms, and corporations whose principal business consists in the operation of retail drug, hardware and grocery stores." This contention means briefly that plaintiffs' agent cannot sell and issue money orders as an adjunct to his drug store business while an agent of American Express, its direct competitor, can do just that.

The admissions in the pleadings establish that American Express Company is an aggregation of individuals operating under a joint company plan. It is not a corporation. It sells and issues money orders in the City of Chicago, Illinois, through operators of drug and grocery stores. It does not operate under any franchise granted by the State of Illinois and is not subject to regulation by any regulatory body thereof.

It thus appears that plaintiffs intend to engage in only one phase of the activities in which a community currency exchange may engage if licensed under the Act in question; that is, the business of selling or issuing money orders under their name. It also appears that American Express Company, which is exempt from the operation of the Act, is engaging in the same activity. It further appears that plaintiffs intend to; and American Express Company does, engage in this busjness through agents operating retail stores of the same types.

Plaintiffs argue that "it is the function and duty of this court to determine whether or not the Act in question violates the Fourteenth Amendment as applied to these plaintiffs."

On the other hand the *amicus curiae* and the defendants argue that it is not the function and duty of this court to determine that question unless and until plaintiffs secure an answer to that question from the Illinois Supreme Court.

It would seem that a plausible argument could be made, on behalf of plaintiffs, to the Illinois Supreme Court, predicated upon the fact that in view of the identical similarity of the business conducted by American Express Company, which is exempt from regulation under the Act, and that in which plaintiffs intend to engage and which on its face the Act says must be regulated by the State, is an arbitrary discrimination. If this argument were made to and accepted as valid by the Illinois Supreme Court, it might well grant to plaintiffs the very relief which they are seeking in this court and hence a suit of this character would be unnecessary. A three judge court, in a case involving a similar situation arising under the currency exchange act of the State of Wisconsin, held that the exemption of American Express Company rendered the statute discriminatory and unconstitutional as applied to the plaintiff in that case. *Currency Services* v. *Matthews*, 90 F. Supp. 40, at 43, 45. However, there no question was raised as to the federal court's jurisdiction, such as the question which now confronts us.

Whether in plaintiffs' situation the Illinois Supreme Court would hold the exemption of American Express Company from the application of the Act constitutional or unconstitutional we do not know. Not having that preseience and being unwilling to guess as to how the Illinois court would decide this question when and if it were presented to it, we have no jurisdiction to make that decision ourselves. Hence we cannot decide the constitutional question presented in the absence of such authoritative determination by the Illinois Supreme Court.

Plaintiffs seem to argue that in *McDougall* v. *Lueder*, 389 Ill. 141, the Illinois Supreme Court has already, in effect, decided that the Illinois Act, as to plaintiffs, does not violate the equal protection of the law provision of the federal constitution, and, accordingly, this court should grant appropriate relief, and that no further state court decision is necessary. In so urging, plaintiffs overlook the plain distinction between the business of the plaintiffs in the *McDougall* case and the business in which they (plaintiffs herein) intend to engage. That distinction plaintiffs themselves have made and emphasized. The *McDougall* plaintiffs were engaged in the general broad activities of a currency exchange, as distinguished from

the limited activities in which plaintiffs herein intend to engage. As we have seen, American Express Company operates only that part of a general currency business which is limited to the issuing and selling of money orders. It does it, without a license issued under the Act, within the same limits plaintiffs wish to operate without being licensed. The Illinois Supreme Court might find that to deny plaintiffs that right would be to deprive them of the same protection which American Express Company enjoys under the law. It well may be that the Illinois Supreme Court would hold the exemption of American Express Company unconstitutional as applied to persons in the position of these plaintiffs and at the same time adhere to its holding that the exemption is constitutional as applied to persons in the position of the *McDougall* plaintiffs. See: *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, at 54 (affirming 313 Ill. 137). The federal courts, before passing on the question urged by the present plaintiffs, must wait until the Illinois Supreme Court has spoken in answer to that same question.

It is therefore necessary that the amended complaint be dismissed for want of jurisdiction. Counsel for defendants will present an order accordingly within five days.

DISSENTING OPINION

HOFFMAN, *District Judge*, dissenting.

I am aware of no decision in which the Supreme Court of the United States has held that a federal district court must, or even should, refuse to entertain a suit under the circumstances present here. The jurisdiction of this court is properly invoked. The plaintiffs, supported by the decision of another three judge court in *Currency Services, Inc.* v. *Matthews*, 90 F. Supp. 40 (W. D. Wis. 1950), have raised a substantial federal constitutional question. The application of the challenged statute to the plaintiffs is unquestioned, and the Supreme Court of Illinois has already upheld the exemption of American Express Company without suggesting that its decision in any way rested on the nature of the activities of the plaintiffs in the decided case. [*McDougall* v. *Lueder*, 389 Ill. 141 (1945)].

The balance between state-federal relations is not so delicate that it would be upset by this court's consideration of the merits of the plaintiffs' claim that the Illinois Currency Exchange Act has deprived them of the equal protection of the laws.

I would grant the prayer of the plaintiffs' amended complaint.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on to be heard before a three-judge court convened pursuant to 28 U. S. C. 2281 and 2284, upon the amended complaint filed by plaintiffs and the answers filed by the defendants; and the court having heard evidence presented in open court and having considered all such evidence heretofore taken, as well as all exhibits offered and received in evidence, and the matter having been argued by counsel, and the court having heard the statements and arguments of counsel and being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The court finds:

(1) This is an action in equity brought by plaintiffs pursuant to the provisions of Sections 2281 and 2284 of Title 28 U. S. C. seeking a permanent injunction to enjoin Orville Hodge, Auditor of Public Accounts of the State of Illinois, Latham Castle, Attorney General of the State of Illinois, and John Gutknecht, State's Attorney of Cook County, Illinois, from enforcing against the plaintiffs the provisions of the Illinois Community Currency Exchange Act, Sections 30 to 56.3 of Chapter 16½ of the Illinois Revised Statutes, 1953, and also praying that said Act be declared unconstitutional and void in its application to plaintiffs on the ground that it denies the plaintiffs the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) The amount in controversy herein exceeds the sum of $3,000, exclusive of interest and costs.

(3) The plaintiffs George W. Dowd, Donald O. McDonald and J. Wesley Carlson constitute a partnership which is organized for the purpose of, intends to engage, and has been engaging, not in the ordinary business of a currency exchange, but exclusively in the business of selling and issuing money orders under the firm name "Bondified Systems", in the Counties of DuPage and Cook and other portions of the State of Illinois. That business is to be conducted through agents who are principally persons engaged in operating retail drug, hardware and grocery stores.

(4) On August 11, 1953, said plaintiffs appointed the plaintiff Derrick (who conducts a drug store) as their agent for the sale to the public of post card checks and money orders issued by the partnership firm.

(5) American Express Company is an aggregation of individuals operating under a joint stock company plan. It is not a corporation. It sells and issues money orders in the City of Chicago, Illinois, through operators of drug and grocery stores. It does not operate under any franchise granted by the State of Illinois and is not subject to regulation by any regulatory body thereof.

(6) It thus appears that plaintiffs intend to engage in only one phase of the activities in which a currency exchange may engage if licensed under the Act in question; that is the business of selling or issuing money orders under their name. It also appears that American Express Company, which is exempt from the operation of the Act, is engaging in the same activity.

(7) It further appears that plaintiffs intend to, and American Express Company does, engage in this business through agents operating retail stores of the same types.

(8) American Express Company operates only that part of a general currency exchange business which is limited to the issuing and selling of money orders. It does it without a license issued under the Act within the same limits in which plaintiffs wish to operate without being licensed.

CONCLUSIONS OF LAW.

1. Plaintiffs' application for a permanent injunction should be denied and the amended complaint should be dismissed for want of jurisdiction at plaintiffs' costs.

2. This court cannot decide the constitutional question presented in the absence of an authoritative determination by the Illinois Supreme Court that the exemption of American Express Company is constitutional as applied to persons in the position of these plaintiffs.

Enter:

ELMER J. SCHNACKENBERG,
Judge of the United States Court of Appeals.

WALTER J. LA BUY,
Judge of the United States District Court.

JULIUS J. HOFFMAN,
Judge of the United States District Court.

Dated: February 9th, 1955.

ORDER OF DISMISSAL FOR WANT OF JURISDICTION.

This action has been heard by this court, Elmer J. Schnackenberg, *Circuit Judge* Presiding, and Walter J. La Buy and Julius J. Hoffman, *District Judges*, sitting. The Court has heard and considered the evidence and arguments of counsel and has read and considered the briefs. It is fully advised in the premises.

Thereupon It Is Ordered in accordance with the views expressed in this Court's opinion, Schnackenberg, *J.* and LaBuy, *J.* concurring and Hoffman, *J.* dissenting, that the plaintiffs' action be and it is dismissed for want of this Court's jurisdiction.

Enter:

ELMER J. SCHNACKENBERG,
Judge.

WALTER J. LABUY,
Judge.

Dated: February 9, 1955.

APPENDIX C

Currency Exchange Law

"An Act in relation to the definition, licensing and regulation of community currency exchanges and ambulatory currency exchanges, and the operators and employees thereof, and to make an appropriation therefor, and to provide penalties and remedies for the violation thereof." (Approved June 30, 1943, in force October 1, 1943, as amended.) (Ill. Rev. Stat. Ch. 164, Pars. 30-56.3.)

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section .01. The General Assembly has found and declares: that the community currency exchange business, as hereinafter defined in Section 1, has become so widespread since the bank holiday in 1933, and so extensively and intimately integrated with the financial institutions of this State that it is affected with a public interest and should be licensed and regulated as a business affecting the convenience, general welfare, and economic interest of the people of this State;

that no community currency exchange should be operated without a license, or otherwise than in accordance with the regulations provided in, or to be provided pursuant to this Act;

that the number of community currency exchanges should be limited in accordance with the needs of the communities they are to serve, and in accordance with the provisions of this Act;

that there has arisen also the ambulatory currency exchange business, as hereinafter defined in Section 1, which has engaged heretofore in unlicensed competition with the licensed community currency exchange business;

that it is in the public interest to promote and foster the community currency exchange business and to assure the financial stability thereof;

that the operations of the ambulatory currency exchange business have enabled it to appropriate the most profitable function of the community currency exchange business

without incurring the expenses of, or subjecting itself to the regulations imposed upon the community currency exchange business, and to secure thereby an unfair advantage; that there has resulted therefrom an unfair and ruinous competition to the licensed community currency exchange business;

that the nature of the ambulatory currency exchange business is such as to render it hazardous and dangerous to the public safety and security;

that the public welfare demands that no ambulatory currency exchange business should be operated without a license, or otherwise than in accordance with the regulations provided in, or to be provided pursuant to this Act:

Section 1. For the purposes of this Act: "Community currency exchange" means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services.

"Ambulatory Currency Exchange" means any person, firm, association, partnership or corporation, except banks organized under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged in one or both of the foregoing businesses, or engaged in performing any one or more of the foregoing services, at any location other than that of a fixed and permanent place of business of his, their or its own.

"Auditor" means the Auditor of Public Accounts.

Nothing in this Act shall be held to apply to any person, firm, association, partnership, or corporation who is engaged primarily in the business of transporting for hire,

bullion, currency, securities, negotiable or non negotiable documents, jewels or other property of great monetary value and who in the course of such business and only as an incident thereto, cashes checks, drafts, money orders or other evidences of money directly for, or for the employees of and with the funds of and at a cost only to, the person, firm, association, partnership or corporation for whom he or it is then actually transporting such bullion, currency, securities, negotiable or non negotiable documents, jewels, or other property of great monetary value, pursuant to a written contract for such transportation and all incidents thereof, nor shall it apply to any person, firm, association, partnership or corporation engaged in the business of selling tangible personal property at retail who, in the course of such business and only as an incident thereto, cashes checks, drafts, money orders or other evidences of money.

Sec. 2. No person, firm, association, partnership or corporation shall engage in the business of a community currency exchange or in the business of an ambulatory currency exchange without first securing a license to do so from the Auditor.

Any person, firm, association, partnership or corporation issued a license to do so by the Auditor shall have authority to operate a community currency exchange or an ambulatory currency exchange, as defined in Section 1 hereof.

No license shall be issued for the conduct of an ambulatory currency exchange on any public street or highway. An ambulatory currency exchange shall be required to and shall secure a license or licenses for the conduct of its business at each and every location served by it, as provided in Section 4 hereof. No license issued for the conduct of its business at one location shall authorize the conduct of its business at any other location.

Any person, firm, association, partnership or corporation that violates this section shall be fined not less than $500.00 nor more than $1,000.00 or imprisoned in the county jail for not more than one year, or both, and the Attorney General or the State's Attorney of the county in which the violation occurs shall file a complaint in the Circuit Court of the county to restrain the violation.

Sec. 3. No community or ambulatory currency exchange shall be permitted to accept money or evidences of money

as a deposit to be returned to the depositor or upon the depositor's order; and no community or ambulatory currency exchange shall be permitted to act as bailee or agent for persons, firms, partnerships, associations or corporations to hold money or evidences thereof or the proceeds therefrom for the use and benefit of the owners thereof, and deliver such money or proceeds of evidence of money upon request and direction of such owner or owners; provided, that nothing contained herein shall prevent a community or an ambulatory currency exchange from obtaining state automobile and city vehicle licenses for a fee or service charge, or from rendering a photostat service, or from rendering a notary service either by the proprietor of the currency exchange or any one of its employees, authorized by the State of Illinois to act as a notary public, or from selling travelers cheques obtained by the currency exchange from a banking institution under a trust receipt, or from issuing money orders or from accepting for payment local utility bills; provided, further, that in accepting any such payment the community or ambulatory currency exchange shall not be deemed to act as agent for the local utility, nor shall such community or ambulatory currency exchange be authorized to receipt for such payment in the name, or on behalf, of such utility.

Sec. 3.1. Nothing in this Act shall prevent a currency exchange from rendering State or Federal income tax service; nor shall the rendering of such service be considered a violation of this Act if such service be rendered either by the proprietor or any of his employees.

Sec. 4. Application for such license shall be in writing under oath and in the form prescribed and furnished by the Auditor. Each application shall contain the following:

(a) The full name and address (both of residence and place of business) of the applicant, and if the applicant is a partnership or association, of every member thereof, and the name and business address if the applicant is a corporation;

(b) The county and municipality, with street and number, if any, where the community currency exchange is to be conducted, if the application is for a community currency exchange license;

(c) If the application is for an ambulatory currency exchange license, the names and addresses of the plants or

businesses at the location or locations to be served by it; and

(d) The applicant's occupation or profession; a detailed statement of his business experience for the ten years immediately preceding his application; a detailed statement of his finances; his present or previous connection with any other currency exchange; whether he has ever been involved in any civil or criminal litigation, and the material facts pertaining thereto; whether he has ever been committed to any penal institution or admitted to an institution for the care and treatment of mentally ill persons; and the nature of applicant's occupancy of the premises to be licensed where the application is for a community currency exchange license. If the applicant is a partnership, the information specified herein shall be required of each partner. If the applicant is a corporation, the said information shall be required of each officer and director thereof.

Such application shall be accompanied by a fee of $25.00 which fee shall be for the cost of investigating the applicant. When the application for a community currency exchange license has been approved by the Auditor and the applicant so advised, an additional sum of $50.00 as an annual license fee for a period terminating on the last day of the current calendar year shall be paid to the Auditor by the applicant; provided, that the license fee for an applicant applying for such a license after July 1st of any year shall be $25.00 for the balance of such year.

When the application for an ambulatory currency exchange license has been approved by the Auditor, and such applicant so advised, such applicant shall pay an annual license fee of $10.00 for each and every location to be served by such applicant; provided that such license fee for an approved applicant applying for such a license after July 1st of any year shall be $5.00 for the balance of such year for each and every location to be served by such applicant. An approved applicant shall not be required to pay the initial investigation fee of $25.00 more than once. Such an approved applicant, when applying for a license with respect to a particular location, shall file with the Auditor, at the time of filing an application, a letter or memorandum, which shall be in writing and under oath, signed by the owner or authorized representative of the place of business where service is to be rendered; such letter or memorandum

shall contain a statement that such service is desired, and that the person signing the same is authorized so to do.

Sec. 4.1. Upon receipt of an application for a license for a community currency exchange, the Auditor shall investigate the need of the community for the establishment of a community currency exchange at the location specified in the application.

"Community", as used in this Act, means a locality where there may or can be available to the people thereof the services of a community currency exchange reasonably accessible to them. If the issuance of a license to engage in the community currency exchange business at the location specified, will not promote the convenience and advantage of the community in which the business of the applicant is proposed to be conducted, then the application shall be denied.

Sec. 4.2. Whenever the ownership of any currency exchange, theretofore licensed under the provisions of this Act, shall be held or contained in any estate subject to the control and supervision of any Administrator, Executor, Guardian or Conservator appointed, approved or qualified by any Court of the State of Illinois having jurisdiction so to do, such Administrator, Executor, Guardian or Conservator, may, upon the entry of an order by such Court granting leave to continue the operation of such currency exchange, apply to the Auditor of Public Accounts for a license under the provisions of this Act. When any such Administrator, Executor, Guardian, or Conservator shall apply for a currency exchange license pursuant to the provisions of this Section, and shall otherwise fully comply with all of the provisions of this Act relating to the application for a currency exchange license, the Auditor may issue to such applicant a currency exchange license. Any currency exchange license theretofore issued to a currency exchange, for which an application for a license shall be sought under the provisions of this Section, if not previously surrendered, lapsed, or revoked, shall be surrendered, revoked or otherwise terminated before a license shall be issued pursuant to application made therefor under this Section.

Sec. 5. Before any license shall be issued to a community currency exchange the applicant shall file annually with and have approved by the Auditor a surety bond, issued by

a bonding company or insurance company authorized to do business in this State in the principal sum of $3,000.00. Such bond shall run to the Auditor and shall be for the benefit of any creditors of such currency exchange for any liability incurred by the currency exchange on any money orders issued or sold by the currency exchange and for any liability incurred by the currency exchange for any sum or sums due to any payee or endorsee of any check, draft or money order left with the currency exchange for collection, and for any liability incurred by the currency exchange in connection with the rendering of any of the services referred to in Section 3 of this Act.

If after the expiration of one year from the issuance of the license the Auditor shall determine that the average amount of such liability during said year has exceeded the sum of $4,000.00 and has been less than $5,000.00, the Auditor shall require the licensee to furnish a bond for the ensuing year to be approved by the Auditor in the principal sum of $4,000.00. If such average amount is in excess of $5,000.00 the bond shall be for an additional principal sum of $1,000.00 for each $1,000.00 or fraction thereof in excess of the original $5,000.00; however, the maximum amount of such bond shall not exceed the principal sum of $25,000.00.

Sec. 6. Every applicant for a license hereunder shall, after his application for a license has been approved, file with and have approved by the Auditor, a policy or policies of insurance issued by an insurance company or indemnity company authorized to do business under the laws of this State, which shall insure the applicant against loss by burglary, larceny, robbery, forgery or embezzlement, in a principal sum as hereinafter provided; if the average amount of cash and liquid funds to be kept on hand in the office of the community currency exchange during the year will not be in excess of $2,500 the policy or policies shall be in the principal sum of $2,500. If such average amount will be in excess of $2,500, the policy or policies shall be for an additional principal sum of $500 for each $1,000 or fraction thereof of such excess over the original $2,500, provided that the maximum amount of such insurance shall in no event exceed the principal sum of $35,000.00. From time to time the Auditor may determine the amount of cash and liquid funds on hand in the office of any community currency exchange and shall require the licensee to submit ad

ditional policies if the same are determined to be necessary in accordance with the requirements of this section.

Any such policy or policies, with respect to forgery, may carry a condition that the community currency exchange assumes the first $50 of each claim thereunder.

Sec. 7. Each community currency exchange shall have, at all times, a minimum sum of $3,000 of its own cash funds available for the uses and purposes of its business and said minimum sum shall be exclusive of and in addition to funds received for exchange or transfer; and in addition thereto each such licensee shall at all times have on hand an amount of liquid funds sufficient to pay on demand all outstanding money orders issued by it.

In the event a receiver is appointed in accordance with Section 15.1 of this Act, and the Auditor determines that the business of the currency exchange should be liquidated, and if it shall appear that the said minimum sum was not on hand or available at the time of the appointment of the receiver, then the receiver shall have the right to recover in any court of competent jurisdiction from the owner or owners of such currency exchange, or from the stockholders and directors thereof if such currency exchange was operated by a corporation, said sum or that part thereof which was not on hand or available at the time of the appointment of such receiver. Nothing contained in this section shall limit or impair the liability of any bonding or insurance company on any bond or insurance policy relating to such community currency exchange issued pursuant to the requirements of this Act, nor shall anything contained herein limit or impair such other rights or remedies as the receiver may otherwise have at law or in equity.

Sec. 8. A community or an ambulatory currency exchange shall not be conducted as a department of another business. It must be an entity, financed and conducted as a separate business unit. This shall not prevent a community or an ambulatory currency exchange from leasing a part of the premises of another business for the conduct of this business on the same premises; provided, that no community currency exchange shall be conducted on the same premises with a business whose chief source of revenue is derived from the sale of alcoholic liquor for consumption on the premises; provided, further, that no community currency exchange hereafter licensed for the first time shall

share any room with any other business, trade or profession nor shall it occupy any room from which there is direct access to a room occupied by any other business, trade or profession.

Sec. 9. No community or ambulatory currency exchange shall issue tokens to be used in lieu of money for the purchase of goods or services from any enterprise.

Sec. 10. The applicant, and its officers and directors, if a corporation, shall be vouched for by two reputable citizens of this State setting forth that the individual mentioned is (a) personally known to them to be trustworthy and reputable, (b) that he has business experience qualifying him to competently conduct, operate, own or become associated with a currency exchange, (c) that he has a good business reputation and is worthy of a license. Thereafter, the Auditor shall, upon approval of the application filed with him, issue to the applicant qualifying under this Act, a license to operate a currency exchange. If it is a license for a community currency exchange, the same shall be valid only at the place of business specified in the application. If it is a license for an ambulatory currency exchange, it shall entitle the applicant to operate only at the location or locations specified in the application, provided the applicant shall secure separate and additional licenses for each of such locations. Such licenses shall remain in full force and effect, until they are surrendered by the licensee, or revoked, or expire, as herein provided. If the Auditor shall not so approve, he shall not issue such license or licenses and shall notify the applicant of such denial, retaining the $25.00 investigation fee to cover the cost of investigating the applicant. The Auditor shall approve, or deny every application hereunder within ninety days from the filing thereof; except that in respect to an application by an approved ambulatory currency exchange for a license with regard to a particular location to be served by it, the same shall be approved or denied within twenty days from the filing thereof.

No application shall be denied unless the applicant has had notice of a hearing on said application and an opportunity to be heard thereon. If the application is denied, the Auditor shall, within twenty days thereafter prepare and keep on file in his office a written order of denial thereof, which shall contain his findings with respect thereto and

the reasons supporting the denial, and shall send by United States mail a copy thereof to the applicant at the address set forth in the application, within five days after the filing of such order. A review of any such decision may be had as provided in Section 22.01 of this Act.

Sec. 10.1. For the purposes of this Act, the Auditor, and the hearing officer, as hereinafter provided, shall have power to require by subpoena the attendance and testimony of witnesses, and the production of all documentary evidence relating to any matter under hearing pursuant to this Act, and shall issue such subpoenas at the request of any interested party. The hearing officer may sign subpoenas in the name of the Auditor.

The Auditor may, in his discretion, direct that any hearing pursuant to this Act, shall be held before a competent and qualified agent of the Auditor, whom the Auditor shall designate as the hearing officer in such matter. The Auditor, and the hearing officer, are hereby empowered to, and shall, administer oaths and affirmations to all witnesses appearing before them. The hearing officer, upon the conclusion of the hearing before him, shall certify the evidence to the Auditor.

Any Circuit Court of this State, within the jurisdiction of which such hearing is carried on, may, in case of contumacy, or refusal of a witness to obey a subpoena, issue an order requiring such witness to appear before the Auditor, or the hearing officer, or to produce documentary evidence, or to give testimony touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Sec. 11. Such license, if issued for a community currency exchange, shall state the name of the licensee and the address at which the business is to be conducted. Such license shall be kept conspicuously posted in the place of business of the licensee and shall not be transferable or assignable. If issued for an ambulatory currency exchange, it shall so state, and shall state the name and office address of the licensee, and the name and address of the location or locations to be served by the licensee, and shall not be transferable and assignable.

Sec. 12. If the Auditor shall find at any time that the bond is insecure or exhausted or otherwise doubtful, an additional bond in like amount to be approved by the Audi-

tor shall be filed by the licensee within thirty (30) days after written demand therefor upon the licensee by the Auditor.

Sec. 13. No more than one place of business shall be maintained under the same license, but the Auditor may issue more than one license to the same licensee upon compliance with the provisions of this Act governing an original issuance of a license, for each new license.

Whenever a licensee shall wish to change the name or place of business as originally set forth in his license, he shall give written notice thereof to the Auditor and if the change is approved by the Auditor he shall attach to the license, in writing, a rider stating the new name or the new address or location of the community currency exchange.

Every application for a change of location of a community currency exchange shall be treated by the Auditor with respect to the approval or disapproval of the proposed location, in the same manner as is otherwise provided in this Act for the treatment of proposed locations as contained in original applications for community currency exchange licenses; and if any fact or condition then exists with respect to the application for change of location, which fact or condition would otherwise authorize denial of an original application for a community currency exchange license because of the proposed location, then such application for change of location shall not be approved.

Sec. 13.1. Whenever two or more licensees shall desire to consolidate their places of business, they shall make application for such consolidation to the Auditor upon a form provided by him. This application shall state: (a) the name to be adopted and the location at which the business shall be located, which name and location shall be the same as one of the consolidating licensees; (b) that the owners, or all partners, or all stockholders, as the case may be, of the licensees involved in the contemplated consolidation, have approved the application; (c) a certification by the secretary, if any of the licensees be corporations, that the contemplated consolidation has been approved by all of the stockholders at a properly convened stockholders' meeting; (d) other relevant information the Auditor may require. Simultaneously with the approval of the application by the Auditor; the licensee or licensees who will cease doing business shall: (a) surrender their license or licenses to the

Auditor; (b) transfer all of their assets and liabilities to the licensee continuing to operate by virtue of the application; (c) apply to the Secretary of State, if they be corporations, for surrender of their corporate charter in accordance with the provisions of "The Business Corporation Act", filed July 13, 1933, as amended.

An application for consolidation shall be approved or rejected by the Auditor within 30 days after receipt by him of such application and supporting documents required thereunder.

Such consolidation shall not affect suits pending in which the surrendering licensees are parties; nor shall such consolidation affect causes of action nor the rights of persons in particular; nor shall suits brought against such licensees in their former names be abated for that cause.

Nothing contained herein shall limit or prohibit any action or remedy available to a licensee or to the Auditor under Sections 15, 15.1 or 15.2 of this Act.

Sec. 14. Every licensee shall, on or before November 15, pay to the Auditor the annual license fee or fees for the next succeeding calendar year and shall at the same time file with the Auditor the annual report required by Section 16 of this Act, and the annual bond or bonds, and the insurance policy or policies as and if required by this Act. The annual license fee for each community currency exchange shall be $50.00. The annual license fee for each location served by an ambulatory currency exchange shall be $10.00.

Sec. 15. The Auditor may, upon ten (10) days notice to the licensee by United States mail directed to the licensee at the address set forth in the license, stating the contemplated action and in general the grounds therefor, and upon reasonable opportunity to be heard prior to such action, revoke any license issued hereunder if he shall find that:

(a) The licensee has failed to pay the annual license fee or to maintain in effect the required bond or bonds or insurance policy or policies or to comply with any order, decision, or finding of the Auditor made pursuant to this Act; or that

(b) The licensee has violated any provision of this Act or any regulation or direction made by the Auditor under this Act; or that

(c) Any fact or condition exists which, if it had existed at the time of the original application for such license, would have warranted the Auditor in refusing the issuance of the license; or that

(d) The licensee has not operated the currency exchange licensed, for a period of sixty consecutive days, unless the licensee was prevented from operating during such period by reason of events or acts beyond the licensee's control.

The Auditor may revoke only the particular license or licenses for particular places of business or locations with respect to which grounds for revocation may occur or exist, or if he shall find that such grounds for revocation are of general application to all places of business or locations, or to more than one place of business or location operated by such licensee, he may revoke all of the licenses issued to such licensee or such number of licenses to which such grounds apply, as the case may be.

A licensee may surrender any license by delivering to the Auditor written notice that he, they or it thereby surrenders such license, but such surrender shall not affect such licensee's civil or criminal liability for acts committed prior to such surrender, or affect the liability on his, their or its bond or bonds, or his, their or its policy or policies of insurance, required by this Act, or entitle such licensee to a return of any part of the annual license fee or fees.

Every license issued hereunder shall remain in force until the same shall expire, or shall have been surrendered or revoked in accordance with this Act, but the Auditor may on his own motion, issue new licenses to a licensee whose license or licenses shall have been revoked if no fact or condition then exists which clearly would have warranted the Auditor in refusing originally the issuance of such license under this Act.

No license shall be revoked until the licensee has had notice of a hearing thereon and an opportunity to be heard. When any license is so revoked, the Auditor shall within twenty (20) days thereafter, prepare and keep on file in his office, a written order or decision of revocation which shall contain his findings with respect thereto and the reasons supporting the revocation and shall send by United States mail a copy thereof to the licensee at the address set forth in the license within five (5) days after the filing in his office

of such order, finding or decision. A review of any such order, finding or decision may be had as provided in Section 22.01 of this Act.

Sec. 15.1 If the Auditor determines that any licensee is insolvent or is violating this Act, he shall appoint a receiver, who shall, under his direction, for the purpose of the receivership, take possession of and title to the books, records and assets of every description of said community currency exchange. The Auditor shall require of the receiver such security as he deems proper and, upon appointment of the receiver, shall have published, once each week for four consecutive weeks in a newspaper having a general circulation in the community, a notice calling on all persons who have claims against the community currency exchange to present them to the receiver.

Within ten days after the receiver takes possession of the property, the licensee may apply to the Circuit Court of Sangamon County to enjoin further proceedings in the premises.

The receiver may operate the community currency exchange until the Auditor determines that possession should be restored to the licensee or that the business should be liquidated. If the Auditor determines that the business should be liquidated he shall direct the Attorney General to file a bill in the Circuit Court of the county in which such community currency exchange is located, in the name of the People of the State of Illinois, for the orderly liquidation and dissolution of the community currency exchange and for an injunction restraining the licensee or the officers and directors thereof from continuing the operation of said community currency exchange.

The receiver shall, thirty days from the day the Auditor determines that the business should be liquidated, file with the Auditor and with the clerk of such court as may have charge of the liquidation, a correct list of all creditors who have not presented their claims. The list shall show the amount of the claim after allowing all just credits, deductions and set offs as shown by the books of the currency exchange. These claims shall be deemed proven unless objections are filed by some interested party within the time fixed by the Auditor or court that has charge of the liquidation.

The Auditor may make a ratable dividend of the moneys collected by the receiver on all claims that have been proved to his satisfaction or adjudicated in a court of competent jurisdiction whenever moneys are available for distribution.

All unclaimed dividends shall be deposited with the Auditor to be paid out by him when proper claims therefor are presented to the Auditor, and the Auditor shall pay the same out of such sums or funds so deposited with him. After one year from the final dissolution of the currency exchange, the Auditor shall make a pro rata distribution thereof to those claimants who have accepted dividends until such claim or claims are paid in full, and if any of said monies shall then remain in his hands, the Auditor shall distribute same pro rata to the owner, owners or stockholders of the currency exchange. The Auditor shall deduct, from the funds so deposited with him the expense of distributing same.

Upon the order of a court of competent jurisdiction of the county wherein the community currency exchange is located, the receiver may sell, or compound, any bad or doubtful debt, and on like order may sell the personal property of the community currency exchange on such terms as the court approves. The receiver shall succeed to whatever rights or remedies the unsecured creditors of the currency exchange may have against the owner or owners, operators, stockholders, directors, or officers thereof, arising out of their claims against the currency exchange; provided, however, that nothing herein contained shall prevent such creditors from filing their claims in the liquidation proceedings. The receiver may enforce such rights or remedies in any court of competent jurisdiction.

At the close of the receivership, it shall be the duty of the receiver to turn over to the Auditor all books of account and ledgers of such currency exchange for preservation. All records of such receiverships heretofore and hereafter received by the said Auditor shall be held by him for a period of two years after the close of the receivership and at the termination of said two year period may then be destroyed.

All expenses of the receivership, including reasonable receiver's, solicitor's and attorney's fees, approved by the Auditor, shall be paid out of the assets of the community currency exchange; and all expenses of any preliminary or

other examinations into the condition of the community currency exchange or receivership, and all expenses incident to the possession and control of any property or records of the community currency exchange incurred by the Auditor shall be paid out of the assets of the community currency exchange. The foregoing expenses shall be paid prior to and ahead of all claims.

Upon the filing of a complaint by the Attorney General for the orderly liquidation and dissolution of a community currency exchange, as herein provided, all pending suits and actions upon unsecured claims against such currency exchange shall abate; provided, however, that nothing contained herein shall prevent such claimants from filing their claims in the liquidation proceeding. In the event a suit or an action is instituted or maintained by the receiver on any bond or policy of insurance issued pursuant to the requirements of this Act, the bonding or insurance company sued, shall not have the right to interpose or maintain any counterclaim based upon subrogation, or upon any express or implied agreement of, or right to, indemnity or exoneration, or upon any other express or implied agreement with, or right against, the currency exchange. Nothing herein contained shall prevent such bonding or insurance company from filing such claim in the liquidation proceeding.

Sec. 15.2. No community currency exchange shall determine its affairs and close up its business unless it shall first deposit with the Auditor an amount of money equal to the whole of its debts, liabilities and lawful demands against it, including the costs and expenses of this proceeding, and shall surrender to the Auditor its community currency exchange license, and shall file with the Auditor a statement of termination signed by the licensee of such community currency exchange, containing a pronouncement of intent to close up its business and liquidate its liabilities, and also containing a sworn list itemizing in full all such debts, liabilities and lawful demands against it. Corporate licensees shall attach to, and make a part of such statement of termination, a copy of a resolution providing for the determination and closing up of the licensee's affairs, certified by the secretary of such licensee and duly adopted at a shareholders' meeting by the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting. Upon the filing with the Auditor of a statement of termination the Auditor shall cause notice thereof to be published once

each week for three consecutive weeks in a public newspaper of general circulation published in the city or village where such community currency exchange is located, and if no newspaper shall be there published, then in a public newspaper of general circulation nearest to said city or village; and such publication shall give notice that the debts, liabilities and lawful demands against such community currency exchange will be redeemed by the Auditor on demand in writing made by the owner thereof, at any time within three years from the date of first publication. After the expiration of such three year period, the Auditor shall return to the person or persons designated in the statement of termination to receive such repayment and in the proportion therein specified, any balance of money then remaining in his possession, if any there be, after first deducting therefrom all unpaid costs and expenses incurred in connection with this proceeding. The Auditor shall receive for his services, exclusive of costs and expenses, two per cent of any amount up to $5,000.00, and one per cent of any amount in excess of $5,000.00, deposited with him hereunder by any one community currency exchange. Nothing contained herein shall affect or impair the liability of any bonding or insurance company on any bond or insurance policy issued under this Act relating to such community currency exchange.

Sec. 16. Each licensee shall annually, on or before the fifteenth day of November, file a report with the Auditor for the fiscal year period from October 1st through September 30th (which shall be used only for the official purposes of the Auditor) giving such relevant information as the Auditor may reasonably require concerning, and for the purpose of examining, the business and operations during the preceding fiscal year period of each licensed currency exchange conducted by such licensee within the State. Such report shall be made under oath and shall be in the form prescribed by the Auditor and the Auditor may at any time and shall at least once in each year investigate the currency exchange business of any licensee and of every person, partnership, association and corporation who or which shall be engaged in the business of operating a currency exchange. For that purpose, the Auditor shall have free access to the offices and places of business and to such records of all such persons, firms, partnerships, associations,

and corporations and to the officers and directors thereof that shall relate to such currency exchange business. The Auditor may at any time, and shall at least, once a year, inspect the locations served by an ambulatory currency exchange, for the purpose of determining whether such currency exchange is complying with the provisions of this Act at each location served. The Auditor may require by subpoena the attendance of and examine under oath all persons whose testimony he may require relative to such business, and in such cases the Auditor, or any qualified representative of the Auditor whom the Auditor may designate, may administer oaths to all such persons called as witnesses, and the Auditor, or any such qualified representative of the Auditor, may conduct such examinations, and there shall be paid to the Auditor for each such examination a fee of $20.00 for each day or part thereof for each qualified representative designated and required to conduct the examination; provided, however, that in the case of an ambulatory currency exchange, such fee shall not be increased by reason of the number of locations served by it.

Sec. 17. Every licensee shall keep and use in his business such books, accounts and records as will enable the Auditor to determine whether such licensee is complying with the provisions of this Act and with the rules, regulation and directions made by the Auditor hereunder.

Sec. 18. The applicant for a community currency exchange license shall have a permanent address as evidenced by a lease of at least six months duration or other suitable evidence of permanency, and the license issued, pursuant to the application shall be valid only at that address or any new address approved by the Auditor.

Sec. 19. The Auditor may make and enforce such reasonable, relevant regulations, directions, orders, decisions and findings as may be necessary for the execution and enforcement of this Act and the purposes sought to be attained herein. All such regulations, directions, orders, decisions and findings shall be filed and entered by the Auditor in an indexed permanent book or record, with the effective date thereof suitably indicated, and such book or record shall be a public document. All regulations and directions, which are of a general character, shall be printed and copies thereof mailed to all licensees within ten (10) days after filing as aforesaid. Copies of all findings, or

ders and decisions shall be mailed to the parties affected thereby by United States mail within five (5) days of such filing.

Sec. 19.1. Whenever an ambulatory currency exchange shall be actively engaged at any place or station on a location licensed under this Act in the cashing of checks other than from within an armored vehicle, such currency exchange shall provide at least one armed guard at each such place or station in addition to the person or persons cashing checks.

Sec. 19.2. Before any license or renewal of license shall be issued for any location served by an ambulatory currency exchange, the applicant thereof shall file with and have approved by the Auditor a surety bond for each such location, issued by a bonding or insurance company, licensed to do business in this State, in the penal sum of $2,000.00. The bond shall be conditioned that the licensee serving the location shall comply with Section 19.1 of this Act and shall pay all lawful claims for money or other property loss, or bodily injury, suffered in the course and by reason of a holdup at such location, that shall occur at the time or times when said licensee failed to comply with said Section 19.1. Such bond shall run to the Auditor and shall inure to the benefit of any person or persons who shall establish a lawful claim or claims as aforesaid. The applicant shall have the right, at his, their, or its option, to file in lieu of the bond or bonds required by this section, a blanket surety bond, which he, they, or it shall have approved by the Auditor, issued by a bonding or insurance company, licensed to do business in this State, covering all the locations served and to be served by such applicant, in a penal sum of not to exceed $100,000.00, conditioned and payable as aforesaid, and specifying that the liability thereunder for each location shall be limited to $2,000.00.

Sec. 20. Every person having taken an oath in any proceeding or matter wherein an oath is required by this Act, who shall swear wilfully, corruptly or falsely in a matter material to the issue or point in question, or shall suborn any other person to swear as aforesaid, shall be guilty of perjury or subornation of perjury, as the case may be.

Sec. 21. Except as otherwise provided for in this Act, whenever the Auditor is required to give notice to any applicant or licensee, such requirement shall be complied with

if, within the time fixed herein, such notice shall be enclosed in an envelope plainly addressed to such applicant or licensee, as the case may be, at the address set forth in the application or license, as the case may be, United States postage fully prepaid, and deposited, registered, in the United States mail.

Sec. 22. Repealed by Act approved June 9, 1949; effective January 1, 1950.

Sec. 22.01. All final administrative decisions of the Auditor hereunder shall be subject to judicial review pursuant to the provisions of the "Administrative Review Act," approved May 8, 1945, and all amendments and modifications thereof, and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 1 of the "Administrative Review Act."

Sec. 22.02. Appeals from all final orders and judgments entered by a court in review of any final administrative decision of the Auditor hereunder may be taken directly to the Supreme Court by either party to the action in accordance with the provisions of the "Civil Practice Act" relating to appeals, and all existing and future amendments and modifications thereof and the rules adopted pursuant thereto.

Sec. 23. If any licensee or agent or employee of a licensee, fraudulently takes and secretes any money, note, bill, bond or other property belonging to another and in the possession and custody of such licensee as agent or otherwise, he shall be guilty of larceny and punished accordingly.

Sec. 24. Any person, firm, association, partnership or corporation who or which shall violate any provision of this Act for which no other penalty is herein prescribed shall, upon conviction, be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), and each violation shall constitute a separate offense.

Sec. 25. Any community currency exchange in existence upon the date of the passage of this Act shall be approved by the Auditor as to location, if all other requirements set forth in this Act shall have been complied with.

Sec. 26. The sum of one hundred thousand dollars ($100,000.00), or so much thereof as may be necessary, is appropriated to the Auditor of Public Accounts for the purpose of administering the provisions of this Act.

Sec. 27. Nothing contained in this Act shall be construed so as to limit the power of municipalities, to license and tax community currency exchanges, and to regulate their location and operation in a manner not inconsistent with this Act.

Sec. 28. Unless an ambulatory currency exchange shall engage in the business of selling or issuing money orders under his, their or its name, or any money orders other than those excepted in Section 1 of this Act, Sections 5, 6 and 7 of this Act shall not be applicable to it. Otherwise, said sections shall apply to it, if it shall engage in such business.

Sec. 29. The operation of any unlicensed community or ambulatory currency exchange, or the unlawful conduct or operation of any licensed community or ambulatory currency exchange, is hereby declared to constitute unfair competition with licensed and legally operated currency exchanges doing business in the same community. Any licensee operating legally under this Act in the same community shall have the right to apply to any court of competent jurisdiction for and obtain an injunction restraining such unfair competition.

Sec. 30. If any part or provision of this Act shall be declared unconstitutional, the unconstitutionality of such part or provision shall not invalidate the constitutional provisions of this Act.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No 475

LLOYD MOREY, Auditor of Public Accounts of the State of Illinois, LATHAM CASTLE, Attorney General of the State of Illinois, and BENJAMIN S. ADAMOWSKI, State's Attorney of Cook County, Illinois,

Defendants-Appellants,

vs.

GEORGE W. DOUD, DONALD G. McDONALD and J. WESLEY CARLSON, [illegible] and EUGENE DERRICK,

Plaintiffs-Appellees.

[illegible]

APPELLANTS' REPLY BRIEF

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Defendants-Appellants,

vs.

GEORGE W. DOUD, DONALD Q. McDONALD, and J. WESLEY CARLSON, doing business as Bondified Systems; and EUGENE DERRICK,

Plaintiffs-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

APPELLANTS' REPLY BRIEF

Appellees have now shifted the theory of their case.

Their amended complaint alleged that "plaintiffs * * * are forbidden to operate in the same manner as American Express Company" (R. 18), and prayed for a decree that the Currency Exchange Act was unconstitutional *in its application to them* because of the alleged discrimination (R. 23-24).

They contend in this Court that the statute arbitrarily selected between those exempted and *all others*, including appellees, engaged in the same business (appellees' brief, p. 11), between a person engaged in the business of selling or issuing American Express money orders, and one engaged in the business of selling or issuing *any other* money orders (appellees' brief, p. 2, 13) and that it is *not* a distinction between American Express and appellees that operates to deprive them of equal protection. (Appellees' brief, p. 13.).

This Court has steadfastly held that in order successfully to assail legislation as unconstitutionally discriminatory, the assailant must point to an actual, not a mere possible, invidious distinction drawn by the legislation.

Appellees have failed to demonstrate that either that they are or that anyone else is the victim of an unreasonable distinction enacted by the Illinois Currency Exchange Act.

Although appellees have failed to name a single person or firm comparably situated with American Express and the others exempted by the statute in question with relation to size and the other attributes referred to in our main brief (p. 18), it would be manifestly unfair to permit appellees to succeed in this litigation because of the speculative rights of unknown other persons or firms more comparably situated than appellees.

Appellees admit "the great size and power of American Express Company" (appellees' brief, p. 15); they admit "that there are differences between American Express Company and appellees" (appellees' brief, p. 13); they assert that

> "the District Court recognized that the American Express Company is one of high integrity and financial

responsibility, to quote its brief" (appellees' brief, pp. 14, 15a; but all these distinctions, obviously relevant to the legislative purpose of eradicating the sale of worthless money orders, failed to impress the court below as affording a rational basis for the distinction, because as stated by that court, the act "denies *one* one but American Express the opportunity to demonstrate financial responsibility or the adoption of adequate safeguards to protect the public."

Although the Illinois legislature concededly had the authority to regulate the business in which appellees engage, and the wisdom of employing any particular mode of regulation is a matter for legislative rather than judicial determination, *Carmichael Securities v. Matthews*, 90 F. Supp. 40, 45 (W. D. Wis. 1950), the court below in effect substituted its judgment for that of the Illinois legislature, and decided that appellees were entitled to the same legislative treatment as that accorded the banks, the Postal Department, the telegraph companies, and American Express; that appellees were in the same class; and that appellees merit the same trust and confidence of the people of Illinois as that enjoyed by those exempted.

Appellees pay lip service to *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78; and while admitting that the Illinois legislature could have made size and index for classification, they claim that "the name on the instrument sold, not size, is [sic] for the so-called classification" (appellees' brief, p. 15a). We fail to follow such sophistry.

If that name stood for high integrity and financial responsibility, as the lower court admittedly recognized and appellees repeatedly conceded, the same can not be said for appellees who are on the verge of insolvency, if not actually insolvent (our main brief, p. 13a), who have falsely represented that they operated under license granted them, that their money orders were "licensed" and "bonded",

and by a unified course of advertising that their business bore relationship to other independent money order businesses in other states with the same name who although they were required by their contract with Checks, Inc. dated August 9, 1953, to furnish operating and financial statements at least once a month (R. 137, 138), failed to have an audit completed even by the time of the trial more than a year later (R. 661); who although they were required by the same contract to capitalize Bondified Systems, Inc. at $40,000 "with not less than $40,000 *paid in*" (R. 160), never did so, but by agreement dated November 14, 1953 between themselves diverted $30,000 of their corporate stock subscriptions to the partnership (R. 171).

Appellees criticize the use of such terms as "diverted" and "siphoned." (Appellees' brief, p. 21). The money order purchasers in Indiana of the Bondified Corporation would certainly refer to the $30,000 transaction as a diversion, if they knew, after purchasing $1,140,000 of corporate money orders, (R. 52, 640), that there was only $38.10 in the corporate bank account. (R. 57, 61.)

Appellees ought not be heard to complain of "siphoned," because their counsel used that very word at the trial when he interrogated on direct examination Mr. Carlson, one of the appellees, as follows:

> "Q. After the partnership took over the corporation, with respect to the Indiana corporation, I believe you said that gradually the money was *siphoned* out of the corporation operating account into the partnership operating account, is that right?
>
> "A. That is right." (R. 47.)

Parenthetically, the partnership never took over the corporation. The partnership became the operating agent of the corporation in Indiana, but the money orders sold in that state were issued by and in the name of the corporation. (Pltfs'. Ex. 10, Reg. 95, 169, 170.)

Appellees seek to distinguish *Williams v. Bailey*, 238 U. S. 36, by citing *Maguire, etc. v. The Maryland*, 206 Md. 281. The *Maryland* case was relied on by the Court of Appeals in 66 F. (2d) 374, 379, 381 (C. A. 4), but the latter decision was reversed in *Williams v. Baltimore*, 289 U. S. 36. The Maryland decision was distinguished by this Court at pp. 43, 45, 46, of its opinion.

Appellees point to the lower court findings that American Express was not licensed to transact business in Illinois; was not subject to Illinois regulation; did not require bonds of its agents; and may be able to avoid service of process in Illinois (appellees' brief, p. 15). American Express was not required to be licensed in Illinois, or to be regulated in that state, or to exact bonds from its agents, in order to be exempted from the Act in question. None of the bonds given or exacted by appellees were performance bonds protecting the public against non-payment of their money orders.

As to the service of process on American Express, we have shown in our main brief (p. 23) that American Express could be sued and served in Illinois as a *de facto* corporation. *Fitzpatrick v. Rutter*, 160 Ill. 282, 286; *Spooner v. Deschaster*, 232 Ill. App. 427, 429; *Duncan v. Aetna Ins. Co.*, 202 Ill. App. 308, 309. Since the passage of the revised Illinois Civil Practice Act, effective January 1, 1956, it can also be sued as a partnership in its firm name, and served personally in New York. Ill. Rev. Stat. 1955, chap. 110, pars. 13.4, 16, 17, 27.1. While American Express is not actually a partnership, an unincorporated joint stock association organized for profit, such as it is, is considered as a partnership in Illinois so far as the rights of third persons and liabilities of members to strangers are concerned. *Hossack v. Ottawa Develop. Ass'n.*, 244 Ill. 274, 291; *Hunter v. Wing*, 208 Ill. App. 487, 491.

We must confess frankly our inability to understand the distinction drawn by the Wisconsin federal court in 90 F. Supp. 40, 44, 45, and by the court below, that if appellees were engaged in a "complete" or "ordinary", currency exchange business, they could not complain of the exemption; but since they were engaged only in the money order business, they could complain thereof, "inasmuch as American Express was engaged in that very business." This distinction, it seems to us, subordinates substance to form; is irrelevant to the legislative purpose; impairs seriously the statutory protection intended to be afforded the people of Illinois; and rewrites the Currency Exchange Statute.

We do not consider that the secondary questions involved here (our main brief, pp. 24-28), have been adequately answered by appellees.

The decree of the court below should be reversed, or reversed and remanded with appropriate directions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

No. 475

LLOYD MOREY, Auditor of Public Accounts of the State of Illinois, LATHAM CASTLE, Attorney General of the State of Illinois, and JOHN GUTKNECHT, State's Attorney of Cook County, Illinois,

Appellants,

vs.

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Appellees.

Appeal from United States District Court for the Northern District of Illinois, Eastern Division

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees move that the decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

On the previous appeal (October term 1955, No. 12, 350 U. S. 485) this Court had before it the complete record of the trial and the constitutionality of the Act was fully briefed and argued. At that time counsel for the respective parties joined in expressing the hope that the Court's opinion on the question then presented might cover also the constitutional question, although it was recognized that this was not necessary to a decision of the question as to jurisdiction. The District Court, conceiving that it had no jurisdiction, had then entered no decree respecting the validity of the Act which this Court could either affirm or reverse. Thereafter, pursuant to the direction of this Court, the District Court proceeded to exercise its jurisdiction and on the same record entered the injunctional decree which is challenged by this appeal.

There is no warrant or basis in the findings of fact or anywhere else in the record for the characterization of appellees' financial operations as "dubious", nor for the statement that plaintiffs are insolvent and afford the public little protection. The District Court found that plaintiffs "operate their business in substantially the same manner as that of the American Express Company" (jurisdictional statement p. 19); that the plaintiffs "have adopted a number of precautionary measures to insure protection of their customers" (p. 22), and that "while the plaintiffs have only begun their business, other Bonded licensees have operated for ten years or more and have conducted a substantial, and so far as this record shows, a responsible business", and "in the first year of operation the plaintiffs sold over $1,400,000 of money orders in northern Indiana alone" (jurisdictional state-

ment, p. 23). The maximum amount for which any one money order is issued either by plaintiffs (R. 224) or American Express Company (R. 359) is $100, and the average charge for the service is about fifteen cents (R. 355). The operating bank account of the Bondified Systems partnership composed of three of the plaintiffs contained $9,000 when the suit was filed (R. 244). In a special account for the payment of money orders the partnership maintained an average daily balance of more than $16,000. (R. 232-243).

ARGUMENT

I. There is no showing or contention that the specific findings of fact made by the District Court were clearly erroneous and Rule 52(a) of the Rules of Civil Procedure applies. *U. S. v. U. S. Gypsum Co.*, 333 U. S. 364, 394; *Gracey Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 274, 275; *U. S. v. Yellow Cab Co.*, 338 U. S. 338.

In its application to the specific facts found by the District Court (findings 3, 4, 8 and 9) the Act deprives the plaintiffs of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution in its complete exemption, irrespective of the financial or other qualifications of one class of persons, firms and corporations, namely, those who sell in retail stores the money orders of whomsoever may be doing business under the name American Express Company, coupled with the absolute prohibition of the sale in such places of other money orders by another class of persons, firms and corporations, including the plaintiffs; namely, those not named in the exemption irrespective of *their* financial or other qualifications. The right to conduct a lawful business is a property right. All persons similarly circumstanced must be treated alike and immunity granted to a class, however limited, having the effect to deprive another class of a personal or property right is a denial of the equal protection of the laws to the latter class. *Truax v. Corrigan*, 257 U. S. 312; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559; *Roaster Guano Co. v. Virginia*, 253 U. S. 412; *Southern Ry. Co. v. Greene*, 216 U. S. 400; *Seaboard Dry Goods Co. v. Louis*, 294 U. S. 550.

2. At page 4 of the jurisdictional statement the question is posed "Should the District Court have held that the Illinois courts had never passed upon the specific legal questions presented herein and therefore have not held appellees to those courts?" On the next page it is said that there is presented a "direct and diametrical conflict of the utterances of the Supreme Court of Illinois and of a triumvirate Federal District Court upon the question of the constitutionality of the statute." In arguing the point on page 13 of the jurisdictional statement reliance is placed upon the previous decision of the District Court reversed by this Court) that a "prerequisite to the exercise of federal equity jurisdiction is a State Supreme Court decision as to the validity of the Act as applied to the plaintiffs. Federal courts withhold the exercise of jurisdiction only when there is a lack of clarity as to the meaning or application of a state statute." It is not contended that the challenged statute is ambiguous or that it may not apply to plaintiffs as to whom the defendants admittedly threaten to enforce it, and there is no question as to its meaning or application.

3. As pointed out in the opinion of the District Court (jurisdictional statement page 23), the Supreme Court of Illinois said: "The General Assembly would surely never have passed the Act if they had thought the said companies [*i. e.*, American Express, Postal Telegraph and Western Union] would be made subject to its rules and regulations." It could hardly be more clearly said that the exemption provision is not severable, and this would seem to be conclusive. If it were not, since the case comes from a Federal court the question of severability could be determined by the Court in the absence of a decision by the

state court (*Guinn v. U. S.*, 238 U. S. 347, 366; *Dorchy v. Kansas*, 264 U. S. 286; *Myers v. Anderson*, 238 U. S. 368, 381; *cf. Skinner v. Oklahoma*, 316 U. S. 535, 543) and that the exemption provision occurs in the definition of "community currency exchange" and could not be severed without changing the meaning of at least 21 sections of the Act which in seventy five instances contain the expression "community currency exchange" or "currency exchange" meaning "community currency exchange" as so defined.

4. The District Court gave several answers to the contention that plaintiffs did not come into court with clean hands because their money orders bore the word "Licensed" (jurisdictional statement pp. 19 and 20): (1) it had no relation to the constitutionality of the Act; (2) it was not shown that any one was deceived; (3) plaintiffs intended the expression to mean that they were licensed by the copyright holder, which was the fact.

The meaning of ambiguous expressions in ordinances and state statutes is to be determined by state courts, but the cases cited by appellants do not hold, and this Court has never held, that whether or not the plaintiffs in a particular case have come into the Federal Court with clean hands must be determined by some other court.

5. The District Court's finding of fact No. 10 (jurisdictional statement p. 26) is as follows: "The defendants concede that plaintiffs will be required to qualify under the Act and that they will enforce it against the plaintiffs when the latter violate it, which admittedly they are doing now. The defendant officials were not apprised of a violation until shortly before plaintiffs filed their com-

plaint. To operate as a currency exchange without first securing a license subjects the plaintiffs to a criminal prosecution and the penalty of a heavy fine or imprisonment, or both. In the meantime the plaintiffs, presumably to avoid further possible penalties, are withholding establishment of additional agencies and losing the opportunity to conduct and expand their business. The plaintiffs have demonstrated the imminence of irreparable injury."

The fact that prosecuting officers of the state have threatened to enforce against the plaintiffs an unconstitutional state law prohibiting them from carrying on their business and if not enjoined will prosecute the plaintiffs, shows the imminence of irreparable injury justifying the exercise of federal equity jurisdiction, since withdrawal from further business until a test case is taken through the state courts, and perhaps to this Court, would result in a substantial loss of business for which no compensation can be obtained. *Toomer v. Witsell*, 334 U. S. 385, 392; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 452; *Hi Grade Provision Co. v. Sherman, et al.*, 266 U. S. 497, 500; *Kennington v. Palmer*, 255 U. S. 100; *Gibbs v. Buck*, 307 U. S. 66, 77, 78.

In *Rast v. Van Deman*, 240 U. S. 342, cited in the jurisdictional statement, this Court said at page 355:

> "It was determined that the bill set forth grounds for equitable relief; that the condition of complainants' businesses and of the property engaged in them was such that the statute, if exerted against complainants and their property, would produce irreparable injury. *Ex parte Young*, 209 U. S. 123; *Robbins v. Los Angeles*, 195 U. S. 223; *Davis & Farnum Mfg. Co. v. Louisiana*, 189 U. S. 207. We concur in this view."

Appellants state that "any moneys paid the auditor under the statute could later have been recovered if paid under protest and the statute were held unconstitutional." Appellants overlook the fact that the statute absolutely prohibits the plaintiffs from selling money orders in retail stores, which is the only business in which they are engaged. The irreparable injury is in the loss the plaintiffs sustain in not being able to conduct their legitimate business.

CONCLUSION

The opinion of the three judge court, and its findings of fact so clearly justify the challenged decree under the authority of decisions of this Court that no substantial question remains, requiring plenary consideration on briefs and oral argument, especially in view of the fact that the court has previously had before it the entire record of the trial and briefs and oral arguments on every question presented in this statement as to jurisdiction.

The motion to affirm should be granted.

Respectfully submitted,

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Appellants

vs.

GEORGE W. DOUD, DONALD Q. McDONALD and J. WESLEY CARLSON, doing business as BONDIFIED SYSTEMS, and EUGENE DERRICK,

Appellees

Appeal from United States District Court for the Northern District of Illinois, Eastern Division

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion delivered by the United States District Court for the Northern District of Illinois, Eastern Division, from whose decree this appeal has been taken is reported in 136 Federal Supplement 887

QUESTIONS PRESENTED

Appellants' brief, page 4, sets forth the first question presented as follows: "Does the exemption of American Express Company money orders, there being no corresponding exemption for appellees, deny appellees the equal protection of the laws?"

As stated, there is an implication that appellees claim to be entitled to the same special privilege given to sellers of American Express Company money orders. To add Bondfied Systems money order to the list of exempt money orders in the definition would merely take away appellees' standing to challenge the exemption, yet the exemption of money orders of both companies could still be challenged as an arbitrary and unreasonable grant of a special privilege to those companies and persons selling their money orders. Fairly stated the question presented is: "Does the definition of 'community currency exchange' contained in the Illinois Community Currency Exchange Act make a reasonable classification between a person engaged in the business of selling or issuing American Express Company money orders and a person engaged in the business of selling or issuing any other money orders?"

The other questions presented are fairly stated in appellants' brief.

STATEMENT.

The District Court, after a trial, enjoined the appellants from enforcing the provisions of the Illinois Community Currency Exchange Act against appellees so long as they engage only in the business of issuing and selling money orders. (R. 528)[2]

The money orders involved in this case are sold by the American Express Company and appellees through

authorized agents located principally in retail establishments such as drug and grocery stores. (R. 16, 27; Pl. Ex. 5, R. 155; 525) They are purchased by persons without bank accounts who need a convenient way of paying their bills. (R. 348)

The Illinois Community Currency Exchange Act establishes a system of regulation of "community currency exchanges," as defined in the Act, throughout Illinois and requires, among other things, that a person within the definition of "community currency exchange" obtain a license from the state, which is contingent upon the payment of a $250.00 investigation fee, the determination by the Illinois State Auditor that the issuance of the license will promote the convenience and advantage of the community in which the business of the applicant is proposed to be conducted, the filing of a surety bond in an amount from $2000 to $25,000 and an insurance policy in an amount from $2500 to $35,000, and the maintenance of a minimum sum of $3000 of cash funds available for the uses and purposes of the business, plus an amount of liquid funds sufficient to pay on demand all outstanding money orders issued. Each community currency exchange is required to pay an annual license fee of $500.00 and no community currency exchange may be conducted as a department of another business. Each must be an entity financed and conducted as a separate business unit.

Section 31 of the statute provides "'Community currency exchange' means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this state and national banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks,

drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services."

The appellees, George W. Doud, Donald Q. McDonald and J. Wesley Carlson, are citizens of Illinois, each of whom owns his own home in Wheaton, Illinois. (R. 37, 50, 68, 69) The appellee, Eugene Derrick, is a citizen of Illinois who has been a druggist for 35 years. (R. 88)

Checks, Incorporated, a Minnesota corporation organized in 1940, is engaged in the business of distributing money orders and other forms used in connection with the transmission of credits, (Deft. Ex. 6; R. 96, 277) bearing the name "Bondified", which is a trade name registered in the United States Patent office. (R. 71)

On August 6, 1953 Bondified Systems, Inc., a Minnesota corporation organized by the appellees George W. Doud, Donald Q. McDonald and J. Wesley Carlson, entered into an "operator contract" with Checks, Incorporated whereby the latter agreed to grant to Bondified Systems, Inc. an exclusive license to distribute Bondified money orders to the public directly and through duly licensed morally and financially responsible agencies appointed by Bondified Systems, Inc. in the greater Chicago metropolitan area, including parts of Indiana. (Deft. Ex. 2; R. 96, 259, Pl. Ex. 5; R. 95, 135). The "operator contract" contains numerous controls and standards which Bondi-

fied Systems, Inc. and its agents or assignees must meet and is much more than a naked license agreement. (R. 525)

The operator contract provides, among other things, that Bondified Systems, Inc. shall have the right of distribution of Bondified money orders so long as Bondified Systems, Inc. shall put forth diligent effort to produce and maintain active agents for the sale of such money orders. It provides that Bondified Systems, Inc. is to establish and maintain a separate car-marked bank account in a bank approved by Checks, Incorporated, which bank is insured by the Federal Deposit Insurance Corporation and a member of the Federal Reserve System and upon which separate car marked account money orders issued by each agent of Bondified Systems, Inc. shall be drawn. It provides that Bondified Systems, Inc. shall maintain a free balance of $10,000 in said account. It provides that the face amounts of all money orders issued by Bondified Systems, Inc., or any of its agencies, shall be deposited in said bank account not later than the eighth business day after being issued and shall remain on deposit until all such money orders have been presented for payment or outlawed by the Statute of Limitations of the state in which they are issued. It provides for a percentage division of the fees collected for the sale of money orders between Bondified Systems, Inc. and its agents. It provides that all the records of Bondified Systems, Inc. and its agents shall be available for inspection by Checks, Incorporated at all times and that Bondified Systems, Inc. shall furnish an operating statement and financial statement to Checks, Incorporated at least once a month. It further provides that Bondified Systems, Inc. shall require a surety bond in the sum of $1000 or more of each of its agents. It

provides that Bondified Systems, Inc. shall furnish a $10,000 bond in favor of the bank where the separate ear-marked account is maintained, which bond shall have as a condition that Bondified Systems, Inc. will at all times have on deposit in such bank sufficient funds so that the bank will promptly pay any Bondified money orders in the amount issued by Bondified Systems, Inc. or its agents. It provides that Bondified Systems, Inc. has the right to assign any and all licenses and rights under the operator license contract to a partnership to be organized under the laws of the State of Illinois, of which the partners shall be J. Wesley Carlson, Donald Q. McDonald and George W. Doud, doing business as Bondified Systems.

Bondified Systems, Inc. received a certificate of authority to do business in Illinois on July 30, 1953. It had been unable to obtain such a certificate until it had amended its charter and application to preclude it from engaging in the currency exchange business in Illinois as defined in the Illinois Community Currency Exchange Act by reason of a policy in the office of the Illinois Secretary of State requiring clearance from the State Auditor, then Orville E. Hodge, before such certificate of authority would be issued. No such policy existed with respect to other corporations which in addition to a charter for a domestic corporation or a certificate of authority for a foreign corporation, were required to have a license to operate. (R. 85, 87; Pl. Ex. 1; R. 95, 126; Deft. Ex. 3; R. 96, 269)

On August 15, 1953 Bondified Systems, Inc. executed an assignment of the license from Checks, Incorporated relating to the Illinois territory covered by the license to the appellees Doud, McDonald and Carlson, a partnership doing business as Bondified Systems. (Pl. Ex. 6; R. 95, 143)

On November 14, 1953 Bondified Systems, Inc. entered into an agency agreement with the partnership for the latter to conduct the Indiana operations as agent of the corporation. (Pl. Ex. 10, R. 95, 169)

The Illinois operations which are carried on by the partnership under the assignment of August 15, 1953, and the Indiana operations which are carried on by the partnership under the agency agreement of November 14, 1953, were combined and the special account required to be kept under the operator contract with Checks, Incorporated was maintained by the partnership for both operations with a provision for an accounting at an appropriate accounting date by the duly authorized accountants to be employed by the corporation and partnership (R. 43, Pl. Ex. 10; R. 95, 169)

At the time of the trial the separate earmarked account for the payment of money orders was maintained at the City National Bank and Trust Company of Chicago and had a balance of $22,827.53, representing the $10,000 free balance required to be maintained under the operator contract with Checks, Incorporated as well as the August 15, 1953 assignment of license plus a "float" or amount of money for which money orders had been issued but were still outstanding and had not been paid or redeemed in the amount of $12,827.53. (R. 62, 67; Pl. Ex. 5; R. 95, 135; Pl. Ex. 6; R. 95, 143) From October 6, 1953 through October, 1954 the partnership maintained an average daily balance of more than $16,000 in this account. (R. 67) The partnership also maintained an operating account for both the Illinois and Indiana operations. (R. 45) This account carried a balance of $9,000 on the day suit was filed, $1[illegible],000 the following week, (Pl. Ex. 20; R. 95, 244) and more than $4,000 at the time of the trial, twelve months later. (R. 62) There re-

mained in a corporate account a balance of $38.10, representing interest which had been paid by one of the appellees on money he had borrowed and paid back to the corporation. (R. 47) At the time of the trial the accounting required under the agency agreement of November 14, 1953 had not been completed. (R. 66) In its first year of operation in a few counties in Northern Indiana the partnership sold more than $1,400,000 in money orders. (R. 64) The appellees Doud, McDonald and Carlson maintain offices in Chicago, Illinois. (Pl. Ex. 4; R. 95, 134A) Bondified Systems, Inc. and the partnership carry a primary commercial blanket bond in the amount of $10,000. (Pl. Ex. 7, R. 95, 147) The partnership has a deposit agreement with the City National Bank and Trust Company of Chicago providing, among other things, for the maintenance of a minimum balance of $10,000 in a special earmarked account for the payment of money orders drawn by them or their agents. (Pl. Ex. 8, R. 95, 157) The partnership has an indemnity bond in the amount of $10,000 in favor of the bank conditioned upon performance of the deposit agreement (Pl. Ex. 9, R. 95, 163) and referred to in the operator contract as a performance bond. (Pl. Ex. 5, R. 95, 135) The partners also have a special purchase agreement for the purchase and sale of the partnership and corporate interests by the survivors in the event of the death of either of them. (Pl. Ex. 11, R. 95, 173)

The appellees Doud, McDonald and Carlson, doing business as Bondified Systems, entered into an agency license agreement with the appellee Eugene Derrick, making him their agent for the sale of Bondified money orders at his place of business in Wheaton, Illinois (R. 88, Pl. Ex. 12, R. 95, 182).

Derrick wrote the State Auditor, then Orville E. Hodge, that he had received the agency, that he claimed the

Illinois Community Currency Exchange Act violated his constitutional right to operate a legal business and that he intended to commence the sale of Bondified money orders as soon as he received his supplies. (Pl. Ex. 23; R. 95, 247) The appellants threatened to enforce the Act against appellees if they violated it. (R. 29). In October, 1953 Derrick received his supplies and proceeded to sell Bondified money orders in Illinois, (Deft. Ex. 4; R. 96, 275; Pl. Ex. 16; R. 95, 224, 225) and to make reports and remittances to the appellees, Doud, McDonald and Carlson. (Pl. Ex. 17; R. 95, 226, 227) and the money orders were paid out of the separate earmarked bank account in which the remittances were deposited. (Pl. Ex. 16 through 19, R. 95, 224-243. Appellees then brought this suit seeking to enjoin the appellants from enforcing the Act against them.

On the partnership money order forms, the word "licensed" appears at the bottom of the form in small letters opposite the word "bonded". (Pl. Ex. 16, R. 95, 224) The word "licensed" refers to the license from Checks, Incorporated. (R. 60, 79, 80) The word "licensed" also appears on the forms sold in Michigan, (Pl. Ex. 29, R. 95, 257) but the Bondified operator in Michigan is not required to have a state license to sell money orders. (R. 79) There is no evidence that the word "licensed" is intended to mean that the money order was licensed under the Illinois Community Currency Exchange Act and there is no evidence that any one was ever misled by the use of that word. (R. 525)

The American Express Company is an aggregation of individuals operating as a joint stock company under the laws of New York. It is engaged in the business of selling and issuing money orders in Chicago through retail establishments such as drug and grocery stores. No statutes

provide for any regulation by any board, commission or regulatory body of the operations of the American Express Company in Illinois. The American Express Company does not operate under any franchise granted by the State of Illinois and the American Express Company is not subject to regulation by any regulatory body in Illinois. (R. 16, 17, 27) There is also the American Express Company, Incorporated, a New York corporation, a wholly owned subsidiary of the American Express Company, which is primarily set up to handle the operations of the American Express Company in foreign countries (R. 340) and in connection with its foreign operations this corporation is subject to government surveillance. (R. 321-322) There was an American Express Company, an Illinois corporation, organized under a special act of the Illinois legislature, (R. 86) which company had its charter cancelled on July 1, 1902 for failure to file annual reports. (R. 87)

The American Express Company and the appellees operate their businesses in Illinois in substantially the same manner in that they confine their operations to selling and issuing money orders and this business is conducted through authorized agents located principally in retail establishments such as drug and grocery stores. (R. 525) Both appellees and American Express Company agents issue money orders in any amount up to and including $100 and their schedules of fees are identical. (Pl. Ex. 42; R. 95, 182, 359)

American Express Company does not always bond its agents (R. 345) as appellees do, (R. 526) nor does it pay every money order issued by its agents (R. 361); litigation occasionally ensues (R. 362) and American Express Company may be able successfully to avoid service of process by the courts of Illinois. (R. 526)

The appellee Derrick is prohibited by Section 38 of the statute from selling Bondified money orders in connection with his drug store business, but he was permitted to sell American Express Company money orders at the same store in 1948 and 1949. (R. 526)

The appellants concede that appellees are required to qualify under the statute and that they will enforce it against them when they violate it, which admittedly they are doing. The appellants were not apprised of a violation until shortly before appellees filed their complaint. To operate as a currency exchange without first securing a license subjects the appellees to a criminal prosecution and the penalty of a heavy fine or imprisonment or both. In the meantime the appellees, to avoid further possible penalties are withholding establishment of additional agencies in Illinois and losing the opportunity to conduct and expand their business. Appellees have demonstrated the imminence of irreparable injury. (R. 526)

SUMMARY OF THE ARGUMENT.

The statute exempts those engaged in the business of selling American Express Company money orders by an arbitrary selection without disclosing some difference, having a reasonable and substantial relation to the purposes of the legislation, between those exempted and all others, including appellees, engaged in the same business. In view of the findings of the District Court fully supported by the record there is no reasonable basis for the exemption.

There was no need to remit the parties to the state courts as the meaning of the statute is clear and its application to the appellees is unquestioned. This Court will decide for itself whether the exemption is severable in a case coming from a lower federal court in the absence of

a controlling state decision, and especially so where the nonseverability of the challenged part is clear from its relationship to the whole statute and the state court has said the statute would not have been passed without the exemption.

The conduct of the appellees had no relationship to the constitutionality of the challenged statute and did not call for the application of the clean hands maxim. In fact, the conduct was not such as to bar them from equitable relief in any case since the use of the words "licensed" and "bonded" was neither intended to mislead, nor did mislead, and had a valid meaning on their money orders. The trademark license under which the appellees operate provides for supervisory control of the product or services and is valid and in nowise a continuing misrepresentation of the ownership of the business and financial responsibility thereof.

The finding that appellees have demonstrated the imminence of irreparable injury is amply supported by the evidence.

ARGUMENT

I.

THE ILLINOIS COMMUNITY CURRENCY EXCHANGE ACT AS AMENDED DENIES APPELLEES THE EQUAL PROTECTION OF THE LAWS.

The distinction that the challenged statute makes is between persons engaged in the business of selling or issuing American Express Company money orders and persons engaged in the business of selling or issuing any other money orders. It is this distinction that operates to deprive appellees of the equal protection of the laws and not a distinction between American Express Company and appellees. As appellees sell or issue their money orders through agencies located in retail establishments their concern is whether their agent, the appellee Derrick, and other persons in Illinois similarly situated are to be barred from selling their money orders but not from selling the money orders of their competitor, American Express Company.

That there are differences between the American Express Company and appellees is not disputed, but it is disputed that any differences justify the distinction made by the Statute.

The exemption declared invalid in *Wedesweiler v. Braudage*, 297 Ill. 228, was a proviso in the Illinois banking law exempting express, steamship and telegraph companies from the prohibition against natural persons, firms or partnerships transmitting money to foreign countries. The Illinois court said:

> "So far as incorporated banks are concerned the reason for the distinction is apparent. As between

natural persons and partnerships on the one hand, and express, steamship and telegraph companies on the other, the distinction is not based upon any just reason. It has no reference to character, solvency, financial responsibility, security, business or monetary facilities, incorporation, method of doing business, public inspection, supervision or report or any other thing having any relation to the protection of the public from loss by reason of the dishonesty, incompetence, ignorance or irresponsibility of persons engaging in that business."

Appellants suggest age, experience, history and governmental surveillance as other things having a relation to the protection of the public from loss. But the bald exemption of American Express Company money orders has no reference to anything except a name on a money order and examining the exemption in light of the findings of the District Court it is apparent that a druggist selling American Express Company money orders in Illinois as opposed to appellee Derrick is not distinguishable in any of the criteria except that he does not always have the security required of Derrick and his business or monetary facility is an unincorporated joint stock company not licensed in Illinois rather than a national bank in Illinois.

Neither a District Court sitting in the Western District of Wisconsin, *Currency Services, Inc., et al., v. Matthews et al.*, 90 Fed. Supp. 40, nor the court below has been able to find a reasonable basis upon which to sustain the distinction.

Appellants suggest that there is a reasonable basis for the distinction if the Illinois legislature could have reasonably believed that American Express Company money orders were much safer than any others, but their suggestion is not supported by the record. The District Court recognized that the American Express Company is of

of high integrity and financial responsibility, unique in its field, but with respect to the sale of its money orders in Illinois found it had no license to transact business, was not subject to any form of state regulation, does not always require bonds of its agents as appellees do, and may even be able successfully to avoid service of process by the courts of Illinois.

The great size and power of American Express Company, amply brought out at the trial of this case, and at the trial in the Western District of Wisconsin, did not impress either court as affording a rational basis for the distinction.

The Illinois legislature could have made size an index for the classification and then only those who fall within the class would qualify for the exemption. *Engle v. O'Malley*, 219 U.S. 128. In the challenged statute the name on the instrument sold, not size, is index for the so-called classification.

If the old American Express Company chartered by special act of the Illinois legislature had not lost its charter in 1902, and if that charter had provided that no seller of American Express Company money orders would ever have to be licensed, the exemption might be justified *Interstate Consolidated Street Railway Co. v. Massachusetts*, 207 U.S. 79.

In *Erb v. Morasch*, 177 U.S. 584, a particular railroad was excepted from an ordinance limiting the speed of trains to six miles per hour. This Court said

> "It is obvious on a moment's reflection that the tracks of different railroads may traverse the limits of a city under circumstances so essentially different as to justify separate regulations."

In *Toyota* v. *Hawaii*, 226 U.S. 184, the challenged statute imposed a license tax of $100 on auctioneers in Hawaii and one of only $15.00 on auctioneers in other districts. There also the geographical distinction justified the different regulations. It is suggested that if that statute exempted auctioneers having a contract with the Dole Pineapple Company there would have been a different result.

Williams v. *Baltimore*, 289 U.S. 36, cited in appellants' brief, page 20, and their jurisdictional statement, page 11, as "squarely in point" did not involve the constitutional provision here invoked. *Mayor, etc.* v. *The Ministers & Trustees of the Starr Methodist Church*, 106 Md. 281, discussed in *Williams* v. *Baltimore* is helpful here. The Maryland court said:

> "In the case we are considering no classification has been made at all so that the law lacks the very first element which it must have to satisfy the Fourteenth Amendment of the Constitution. It is simply an arbitrary selection of the property of the appellee and the conferring of a benefit upon it which is denied all other owners of similar property. If this can be done in one case it can be done in another and it would then be the power of the legislature to wilfully discriminate between its citizens, taxing some on account of their property and at the same time exempting others similarly situated and all the while acting under no reasonably proper rule whatever, but solely at the dictation of its own caprice. Even an unreasonable classification of property is prohibited by the Fourteenth Amendment. All the more must a perfectly unreasonable discrimination between properties in the same class be prohibited by the same amendment."

None of the findings of the District Court is challenged by appellants save one, that American Express Company may not be subject to service of process by the courts in

Illinois. Their challenge is based on a change in the Illinois Civil Practice Act made subsequent to the trial, but neither before nor after the adoption of the present Illinois Civil Practice Act is an unincorporated association subject to an action at law in Illinois and while now a partnership may be sued, there is not only no showing that American Express Company is a partnership, but the record shows it is not.

No doubt appellees had the burden of proving that the statute created an arbitrary and unreasonable classification. The District Court recognized that burden of proof

The exemption having been properly attacked must disclose its rational basis of discrimination. It is not to be supported by mere fanciful conjecture and cannot stand as reasonable if it offends the plain standards of common sense. Appellants invoke the presumption which attaches to any legislative action, but that is a presumption of fact of the existence of conditions supporting the legislation As such it is a rebuttable presumption. It is not a conclusive presumption or a rule of law which makes legislative action invulnerable to constitutional assault. *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U.S. 194.

Appellants have directed the Court's attention to statutes of four other states which appellants say involve legislation of varying degrees of similarity. In no other statute, except the Wisconsin statute, is there a bald exemption of persons selling American Express Company money orders and the exemption in the Wisconsin act was held unreasonable and unconstitutional in *Currency Services, Inc.* v. *Matthews*, 90 Fed. Supp. 40.

The other statutes cited by appellants at p. 6 do not exempt American Express Company by name. Neither the

New York nor New Jersey statutes cited involve the regulation of the sale of money orders. Both of those statutes merely involve the regulation of check cashing and neither of those statutes makes an exemption of any kind. The California statute exempts from its operation all those licensed under and complying with another article of the California code.

II.

THE STATUTE IS NOT LACKING IN CLARITY AS TO ITS APPLICATION TO APPELLEES OR THE MEANING OF THE CHALLENGED EXEMPTION AND ITS DISCRIMINATORY EFFECT UPON APPELLEES IS CLEAR. AS THE CHALLENGED EXEMPTION IS IN THE DEFINITION OF COMMUNITY CURRENCY EXCHANGE IT AFFECTS THE WHOLE STATUTE AND IS NOT SEVERABLE.

The court below in saying that appellees are engaged in the business of selling money orders but not in the ordinary business of a currency exchange makes no novel observation in light of common experience, but there is no question that appellees' agent Derrick is engaged in the community currency exchange business as defined in the challenged statute. In stating that the Illinois Supreme Court in *McDougall* v. *Lawler*, 389 Ill. 141, did not have occasion to consider the full extent of the statute's discriminatory effect, the District Court was attempting an explanation of why that court sustained the discrimination. It is not a reason to remit appellees to the state courts that such courts must be given an opportunity to point out the obvious discriminatory effect upon persons in appellees' class.

The Supreme Court of Illinois has held the Act and the exemption valid and further said that "The General As-

sonably would surely never have passed the Act if they had thought the sand companies would be made subject to its rules and regulations." The state court thus found that the exemption provisions were not severable, which also distinguishes this case from *Federation of Labor v. McAdory*, 325 U.S. 450, and *CIO v. McAdory*, 325 U.S. 472. In *Staubach v. Worley*, 339 U.S. 328, the plaintiffs were not seeking to prevent continuing loss from being unable to carry on a lawful business, but without showing any danger of loss attacked the Hawaiian statute which carried no criminal penalties for infractions, which was not clear as to its application to certain schools and teachers and which had not been construed by the Hawaiian courts. The Supreme Court of Illinois has held that the challenged act would not have been passed without the exemption and it must follow that the exemption is not severable even though the Illinois Supreme Court has not decided whether the severability clause of the statute would be so applied as to remove the alleged discrimination. Here if the severability clause were applicable the meaning of the words "community currency exchange" as used in the Act some sixty odd times would be changed and the scope of the Act would be enlarged to include some 1300 odd sellers of American Express Company money orders in Illinois. (R. 34-36)

While a decision of the state court as to severability of a provision is conclusive upon this Court, if there is no controlling state court decision in cases coming from the lower federal courts such questions of severability must be determined by the Supreme Court. *Dorchy v. Kansas*, 264 U.S. 286, 290, 291; *Corrigan v. United States*, 238 U.S. 347, 366; *Mayo v. Anderson*, 238 U.S. 368, 386. Thus by reason of the decision in *McDougall v. Lauder*, 389 Ill. 141, 151, holding that the exemption is not severable and the relationship the exemption has to the definition, which

in turn is related to the whole, there is no doubt that the exemption is not severable, and there is no question that this Court can determine the issue of severability.

III

THE DISTRICT COURT FOUND THAT APPELLEES WERE NOT GUILTY OF ANY CONDUCT OF SUCH A NATURE AS TO BAR THEM FROM EQUITABLE RELIEF OR ANY CONDUCT HAVING ANY RELATION TO THE CHALLENGED STATUTE CALLING FOR THE APPLICATION OF THE CLEAN HANDS MAXIM.

The District Court by reference to *Toomer* v. *Witsell*, 334 U.S. 385, gave appellants a short answer to their insistence that appellees' conduct is of such a nature as to bar them from equitable relief. In that case this Court said:

> "The District Court held that this previous misconduct, not having any relation to the constitutionality of the challenged statutes, did not call for application of the clean hands maxim. We agree."

In addition the District Court found as a fact that appellees' use of the words "licensed" and "bonded" on their money orders was not intended to deceive the public, and in fact did not deceive, but was intended to refer to a license from Checks, Incorporated to handle Bonded money orders.

Appellants now ignore both the short answer and the finding of fact.

They appear to contend that the District Court should have found and that this Court should find, or direct the District Court to leave the question to the state court for determination, that plaintiffs came into court without clean hands. The appellants omit the facts at page 26 of their

brief that on each money order it was plainly indicated that the Bondified money transfer trademark was registered in the United States Patent Office by Checks, Incorporated, of Minneapolis, Minnesota, that the appellees were licensed, and bonded and that the account maintained at the City National Bank and Trust Company of Chicago pursuant to a deposit agreement was bonded.

The word "license" means simply permission or authority and does not mean necessarily government or state authority. *Sinnot* v. *Davenport*, 63 U.S. (22 Howard) 227, 240; *Elliott Co.* v. *Lagonda Mfg. Co.*, 205 Fed. 152, 157; *Western Electric Co.* v. *Pacent Reproducer Corp.*, C.C.A. 2, 42 Fed. 2d 116, 118; *Hartford Ins. Co.* v. *Peoria*, 156 Ill. 429, 427. The record shows that Bondified money orders bearing precisely the same legend have been and are being sold in Michigan where no state license is required to sell money orders.

The argument that the indiscriminate use of the word "Bondified" is a continuing misrepresentation of the ownership of the business and the financial responsibility thereof completely ignores the fact that "Bondified" is a service mark as distinguished from a trademark, and even a trademark may be licensed so long as the agreement is not merely a "naked" license agreement. *E. I. duPont de Nemours Co.* v. *Celanese Corp. of America*, 167 Fed. 2d 848. A trademark license is valid if it provides for supervisory control of the product or service. *Arthur Murray, Inc.* v. *Horst*, 110 Fed. Supp. 678.

This is the second time appellants seek in this court to condemn the appellees as irresponsible persons engaged in "an objectionable enterprise" (Appellants' brief, p. 22), coming into a court of equity without clean hands. Use of the words "injected" (appellants' brief p. 11), "diverted" (appellants' brief p. 12), "siphoned" (appellants'

brief p. 10) is made in a patent and calculated attempt to make this Court believe that appellees should be barred from equitable relief. Ignoring the actual operations of the appellees and their agreements with one another and their corporation they state at page 13 of their brief "Thus the corporation has only a few dollars. The partnership owes the corporation at least $45,000 and has about $27,000 in their operating and special accounts against which there is an undisclosed amount of outstanding unpaid money orders". We have stated the facts at length in order to set the record straight on this appeal. Much is made of the $38.10 remaining in the corporate bank account which has a balance only because one of the appellees borrowed money from their corporation and paid it back with $38.10 interest. There is nothing in the record to support the statement that the partnership is indebted to the corporation. The partnership is performing valuable services for the corporation and the members of the partnership have lent their personal credit to the success of what would have been a corporate venture but for the unusual "policy" of clearance by arrangement between the State Auditor, Orville E. Hodge, and the Secretary of State.

IV.

THE FINDING OF THE DISTRICT COURT THAT THE APPELLEES HAVE DEMONSTRATED THE IMMINENCE OF IRREPARABLE INJURY IS SUPPORTED BY THE RECORD.

Appellants now challenge the sufficiency of evidence of irreparable injury to appellees. Again the findings of fact are ignored. (Finding of fact No. 10, R. 526)

The fact that prosecuting officers of the state have threatened to enforce against the appellees an unconstitutional state law relating to their business, and if not enjoined will prosecute the appellees unless they comply with such law

shows the imminence of irreparable injury justifying the exercise of federal equity jurisdiction since withdrawal from further business until a test case is taken through the state courts, and perhaps to this Court, would result in substantial loss of business for which no compensation could be obtained: *Toomer* v. *Witsell*, 334 U.S. 385, 392; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 452; *Hygrade Provision Co.* v. *Sherman, et al.*, 266 U.S. 497, 500; *Ex-mination* v. *Palmer*, 235 U.S. 100; *Gibbs* v. *Buck*, 307 U.S. 66, 77, 78.

CONCLUSION

The inclusion in the definition of the term "community currency exchange" of one who is "engaged in the business of selling or issuing money orders", coupled with the exemption by name of a concern engaged in that very business, renders the statute discriminatory and unconstitutional.

For the reasons stated it is respectfully submitted that the judgment should be affirmed.

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